

Applicant Details

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Applicant Education

BA/BS From	University of Maryland- College Park
Date of BA/BS	May 2019
JD/LLB From	The University of Chicago Law School
	https://www.law.uchicago.edu/
Date of JD/LLB	June 1, 2024
Class Rank	School does not rank
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	No
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Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Professional Organization

Organizations **Just The Beginning
Foundation**

Recommenders

Morse, Michael
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Buss, Emily
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Doerfler, Ryan
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**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

1853 Foxwood Circle
Bowie, MD 20721

June 29, 2023

The Honorable Kimberly A. Swank
United States District Court for the Eastern District of North Carolina
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am a rising third-year law student at the University of Chicago Law School, and I am excited to apply for a clerkship in your chambers. I was born and raised in Prince George's County, Maryland. I believe that clerking for the United States District Court for the Eastern District of North Carolina would provide me with a practical understanding of trial proceedings and expose me to a wide range of legal topics. In addition, I value the opportunity to develop excellent research and writing skills as a clerk in your chambers. I am particularly interested in clerking for you and would value your mentorship as I begin my own career as a litigator.

Serving in leadership has given me the collaborative skills needed to work in close quarters on important issues. As President of our Black Law Students Association, I put action to my strong commitment to legal diversity, leading a team of ten people to provide academic and professional opportunities to law students and future law students. This experience also gave me a strong belief in the importance of being a collaborative team player. I understand the value of contributing and elevating different perspectives to the important work of the court.

I also have strong legal research and analytical skills. Prior to law school, I gained practical experience as a paralegal by assisting attorneys in drafting legal documents and memoranda, performing legal research, and preparing evidence for trial. During trials, I was tasked with taking notes, preparing witnesses, providing feedback on courtroom climate, and generating new exhibits as needed. I formed an interest in litigation and clerking after working on my first trial. I found the opportunity to observe attorneys in the courtroom and their interactions with the judge intriguing and insightful. At Sidley Austin, I worked on a variety of litigation projects, including DOJ investigations regarding criminal charges and antitrust violations. I also collaborated with associates on a legal brief analyzing complex contract damages provisions. These experiences as a Summer Associate further solidified my interest in litigation.

My resume, transcripts, and writing sample are enclosed. Letters of recommendation from Professors Emily Buss, Ryan Doerfler, and Michael Morse will arrive under a different cover. Should you require additional information, please let me know.

Sincerely,

/s/ Sydney Chapman
Enclosures

Sydney Chapman

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EDUCATION

The University of Chicago, Chicago, IL

Juris Doctor, expected June 2024

- Honors: Donald Egan Scholarship Recipient from the University of Chicago Law School, Illinois Judicial Council Scholarship Recipient, BLSA Midwest Chapter of the Year Award
- Activities: President of the Black Law Students Association, Entertainment and Sports Law Society 1L Representative

University of Maryland, College Park, MD

Bachelor of Arts, Criminology & Criminal Justice, Minor in Spanish, May 2019

- Honors: University Honors College, Dean's List 2015- 2019, National Society of Collegiate Scholars, Alpha Lambda Delta and Phi Eta Sigma Honors Societies
- Activities: Study Abroad in Thailand and Cambodia studying human trafficking, Alpha Kappa Alpha Sorority, Inc., Mock Trial Team, University of Maryland Women's Basketball Team Manager

EXPERIENCE

Davis Polk Wardell LLP, New York, NY

Summer Associate & Diversity, Equity & Inclusion Fellow, Summer 2023

Sidley Austin LLP, Washington, DC

1L Fellow, Summer 2022

- Conducted legal research in various practice areas including white collar investigations and commercial litigation
- Assisted in developing multiple Day 1 presentations defending transactions subject to antitrust investigations by DOJ and FTC
- Drafted interview notes capturing client meetings in preparation for DOJ interviews

Melehy & Associates, Silver Spring, MD

Paralegal, October 2019 – April 2021

- Assigned to Trial Team for 2-week civil trial in federal court; created exhibit binders, helped attorneys during witness examinations, coordinated witnesses, and helped draft examination questions
- Assisted attorneys in drafting motions, memos, briefs and other legal documents regarding employment law
- Delivered excellent customer service by attentively listening and responding to client needs and concerns via telephone, email and in-person communication
- Assisted in all aspects of pre-trial hearing preparation including creating exhibits and outlining documents
- Supported attorneys during EEOC hearings and court proceedings
- Performed legal research in Westlaw to help attorneys write briefs and confirm rules

Homeland Security USCIS, Washington, DC

Research Intern: Refugee, Asylum and International Operations Directorate, June 2018 – May 2019

- Researched human rights and country conditions to aid in the adjudication of refugee and asylum applications
- Responded to queries relating to socio-political conditions, natural disasters, religious persecution, and armed rebellions across the world

Georgetown Law Criminal Justice Clinic, Washington, DC

Intern Investigator: Criminal Defense & Prisoner Advocacy Clinic, January 2018 – May 2018

- Performed all aspects of investigations such as locating and speaking to witnesses, writing investigative memoranda, and performing comprehensive background investigations

INTERESTS

- Weight lifting, crocheting, ceramics, women's collegiate basketball



Name: Sydney Chapman
Student ID: 12334940

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

University of Maryland at College Park
College Park, Maryland
Bachelor of Arts 2019

Beginning of Law School Record

Autumn 2021					
Course	Description	Attempted	Earned	Grade	
LAWS 30101	Elements of the Law Lior Strahilevitz	3	3	177	
LAWS 30211	Civil Procedure Emily Buss	4	4	178	
LAWS 30611	Torts Saul Levmore	4	4	177	
LAWS 30711	Legal Research and Writing Michael Morse	1	1	178	

Winter 2022					
Course	Description	Attempted	Earned	Grade	
LAWS 30311	Criminal Law Sonja Starr	4	4	177	
LAWS 30411	Property Lee Fennell	4	4	177	
LAWS 30511	Contracts Eric Posner	4	4	178	
LAWS 30711	Legal Research and Writing Michael Morse	1	1	178	

Spring 2022					
Course	Description	Attempted	Earned	Grade	
LAWS 30712	Legal Research, Writing, and Advocacy Michael Morse	2	2	178	
LAWS 30713	Transactional Lawyering Douglas Baird	3	3	174	
LAWS 40101	Constitutional Law I: Governmental Structure Bridget Fahey	3	3	177	
LAWS 44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	182	
LAWS 47411	Jurisprudence I: Theories of Law and Adjudication Brian Leiter	3	3	175	

Autumn 2022

Course	Description	Attempted	Earned	Grade
LAWS 41601	Evidence Geoffrey Stone	3	3	176
LAWS 43224	Admiralty Law Randall Schmidt	3	3	176
LAWS 53704	Hate Crime Law Meets Writing Project Requirement	3	3	178
Designation:	Juan Linares			
LAWS 90226	Housing Initiative Transactional Clinic Jeffrey Leslie	1	0	

Winter 2023

Course	Description	Attempted	Earned	Grade
LAWS 45701	Trademarks and Unfair Competition Omri Ben-Shahar	3	3	175
LAWS 46101	Administrative Law David A Strauss	3	3	176
LAWS 53201	Corporate Criminal Prosecutions and Investigations Andrew Boutros	3	3	180
LAWS 90226	Housing Initiative Transactional Clinic Jeffrey Leslie	1	0	

Spring 2023

Course	Description	Attempted	Earned	Grade
LAWS 43244	Patent Law Jonathan Masur	3	3	177
LAWS 47101	Constitutional Law VII: Parent, Child, and State Emily Buss	3	3	177
LAWS 53363	The Law, Politics, and Policy of Policing Sharon Fairley	3	0	
LAWS 53382	The Constitutional Rights of Young People, from Young People's Point of View Emily Buss	3	3	180
LAWS 90226	Housing Initiative Transactional Clinic Jeffrey Leslie	1	0	

Honors/Awards

The Donald E. Egan Scholar Award, to a student who has demonstrated a strong interest in the Law School and has a reputation for integrity

End of University of Chicago Law School



Sydney Chapman
Writing Sample

I prepared the attached writing sample for my Legal Research & Writing class at the University of Chicago Law School. In this assignment, I was asked to write a brief for plaintiff-appellant Danny Midway on fictional claims of negligence and breach of contract in the Seventh Circuit without having read the appellee's brief. To create a ten-page writing sample, I omitted the Statement of Jurisdiction, Statement of the Issue, Statement of the Case, Summary of Argument, Standard of Review, and the Conclusion. I received feedback from my professor and feedback from my school's writing coach. I have provided a basic summary of the facts below.

Appellant Danny Midway purchased an online vault from DataVault to store his personal and business passwords, usernames, and financial information. DataVault generates user IDs for each customer that includes their social security number and full name. The Department of Homeland Security issued a notice to all companies using Shaffer Software warning them to update their software. Following the notice, DataVault did not update their software and suffered a data breach. Hackers downloaded the entire vaults and internal IDs of all of DataVault's customers. To remedy this hack, DataVault offered free credit monitoring and identity theft services to all customers. DataVault customers have not yet experienced fraudulent transactions or experienced identity theft following the breach. Midway sued for negligence and implied breach of contract alleging three injuries: (1) increased risk of identity theft and fraudulent charges, (2) personal and business costs from migrating and monitoring his accounts, and (3) emotional distress. The district court granted DataVault's Rule 12(b)(1) motion to dismiss for lack of Article III standing.

VII. ARGUMENT

Article III of the U.S. Constitution limits federal courts' jurisdiction to "Cases" and "Controversies." U.S. CONST. art. III, § 2. To establish Article III standing, a litigant must show three things. The litigant must show that (1) he suffered an injury in fact, (2) there is a "causal connection between the injury and the conduct complained of," and (3) the injury in fact is likely to be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 112 S. Ct. 2130, 2136 (1992). For the harm to satisfy the injury-in-fact requirement, it must be "concrete, particularized and actual or imminent." *Id.* at 2134.

Tangible harms, "such as physical harms and monetary harms," qualify as concrete injuries in fact. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Intangible harms can also be concrete, but the courts look to whether the intangible harms have a "close relationship" to a harm traditionally recognized as a basis for a lawsuit at common law in U.S. courts. *Id.* See also *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Those traditionally recognized harms include disclosure of private information. *TransUnion*, 141 S.Ct. at 2204. A claim based on a statutory violation would be considered an injury-in-law claim. The court follows this same analysis for injury-in-law claims because statutory violations do not automatically qualify as injuries in fact. See *id.* at 2205. A plaintiff who only suffers a statutory violation, absent physical or monetary harm, would have to show that the violation has a close relationship to a harm traditionally recognized. *Id.* at 2204-5.

The resulting harms to Midway are "fairly traceable" to Datavault's data breach. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1140 (2013). The injury is also judicially redressable in the form of damages to compensate Midway. This brief will discuss each claim of injury separately and explain why each independently satisfies the Article III requirements.

A. Midway has Article III Standing Based on Costs Incurred

Midway has Article III standing based on the incurred mitigation expenses involved with monitoring and updating his personal and business financial accounts due to the substantial risk of identity theft and fraudulent charges. *Id.* at 1143. *Clapper* stated that a litigant must show that the “threatened injury is certainly impending” and that a litigant cannot recover for mitigation expenses when the harm is not imminent. *Id.* at 1143, 1152. A litigant “cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.” *Id.* at 1143. However, the reasoning in *Clapper* does not require plaintiffs to demonstrate that “it is literally certain that the harms they identify will come about.” *Id.* at 1150. The Court “has found standing based on a ‘substantial risk’ that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.” *Id.*

1. The Offer of Credit Monitoring Demonstrates a Substantial Risk of Future Harm

Datavault’s offer of credit monitoring indicates a recognition of a substantial risk of future harm. In *Remijas v. Neiman Marcus Grp., LLC*, this Court found standing for plaintiffs who’s credit card information was compromised following a data breach from Neiman Marcus. 704 F.3d 688, 689-90 (7th Cir. 2015). *Remijas* emphasized the importance of the offer of credit monitoring, noting that “it is telling in this connection that [defendant] offered one year of credit monitoring and identity theft protection.” *Id.* at 694. The presence of an offer of credit monitoring and identity theft protection indicates that Datavault does not think the “risk is so ephemeral that it can be safely disregarded.” *Id.* Additionally, “these credit-monitoring services come at a price that is more than *de minimis*.” *Id.* *Remijas* notes that even “an affected customer, having been notified by [defendant] that her card it at risk, might think it necessary to subscribe to a service that offers monthly credit monitoring” and “that easily qualifies as a concrete

injury.” *Id.* When a corporation offers credit monitoring and identity theft protection services, it has identified a substantial risk of future harm and is trying to participate in preventing that harm. Datavault’s participation in the mitigation efforts demonstrates that Midway faces a substantial risk of identity theft and fraudulent charges.

2. Midway’s Mitigation Efforts to Avoid Future Harm Were Reasonable

Midway’s mitigation actions were objectively reasonable and satisfy the injury-in-fact requirement. The Seventh Circuit has found that standing requirements were satisfied for costs incurred in migrating accounts because “the value of one’s own time needed to set things straight is a loss from an opportunity-cost perspective” and so “these injuries can justify money damages.” *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 828 (7th Cir. 2018). Midway was not attempting to manufacture standing by using a telephone to migrate his accounts. *Midway*, at 6-7. All of his personal and business information was stolen and he had a valid fear of changing passwords via the internet. *Id.* at 5. The hackers likely have his personal and business bank account and email passwords (only protected by an encrypted password). *Id.* The hackers can use the Forgot Password feature to reset the password via email and retrieve that email to set a new password with little effort. Midway’s actions were justified because there is an “objectively reasonable likelihood” that the injury will occur. *Clapper*, 133 S. Ct. at 1147. In addition, Datavault’s data breach forced him to stop using his business credit card, placing a huge financial toll on his small business. *Id.* at 7. Midway did not have access to credit for over a year, severely affecting his inventory and forcing him to cancel 3,800 orders. *Id.* “Monetary harms readily qualify as concrete injuries under Article III.” *TransUnion*, 141 S. Ct. 2197, *see also* 2200. Midway’s personal and business injuries resulting from his mitigation efforts are reasonable and qualify as injuries in fact.

B. The Increased Risk of Identity Theft and Fraudulent Charges is an Injury In Fact

1. Article III Only Requires a Substantial Risk of Future Harm

A substantial risk of future injury can satisfy the injury-in-fact requirement. In addition to being “concrete, particularized, and actual or imminent,” a threatened injury must be “certainly impending” to satisfy the injury in fact requirement. *Clapper*, 133 S. Ct. at 1147. A simple allegation of future harm is not sufficient. *Id.* *Clapper* described a “substantial risk” standard that does “not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about.” *Id.* at 1150. The Court has found standing based on a “substantial risk that the harm will occur.” *Id.* Courts have emphasized that victims of a data breach “should not have to wait until hackers commit identity theft” in order to have standing because there is an “objectively reasonable likelihood for such injury to occur.” *Remijas*, 794 F.3d at 693; *Clapper*, 133 S. Ct. at 1147.

2. The Data Breach Caused a Substantial Risk of Future Harm

The extremely sensitive and private information stolen during Datavault’s data breach creates a substantial risk of future harm. Hackers stole Midway’s full name and SSN along with his entire personal vault. DataVault only protected his information with an encrypted password that his hackable in less than two hours. *Midway*, at 4-5. Supreme Court and Seventh Circuit precedent support Midway’s claim of risk of identity theft as an injury in fact.

The *Remijas* plaintiffs showed an “increased risk of future fraudulent charges and greater susceptibility to identity theft.” *Remijas*, 794 F.3d at 692. Hacker’s stole plaintiffs’ credit card information and some plaintiffs also experienced fraudulent charges on their cards. There was “no need to speculate” about whether information was stolen. *Id.* at 693. In data breach cases, “the purpose of the hack is, sooner or later, to make fraudulent charges or assume those

customers' identities." *Id.* Midway's case is even more threatening than *Remijas* because his stolen data is more sensitive, containing SSNs and bank account numbers. *Midway*, at 5. The substantial risk of identity theft is evident and certainly impending.

In *Clapper*, the Supreme Court found no Article III standing because the injury was too speculative. *Clapper*, 133 S. Ct. at 1143. There, plaintiffs believed their communications would be monitored due to a statute allowing governmental surveillance without probable cause for communications between suspected terrorists and people located within the United States. *Id.* at 1145. There was no injury in fact because the allegation of future injury was too speculative to satisfy the certainly impending requirement. *Id.* at 1143. The government would have to (1) target plaintiffs' communications, (2) use the challenged statute to gain approval for the surveillance, (3) receive authorization from a court, and (4) succeed in infiltrating the communications. *Id.* at 1149-50. The court referred to these actions as a "speculative chain of possibilities" that was insufficient to establish standing based on the risk of future harm. *Id.* at 1150.

Midway's case is distinguishable from *Clapper*. Here, the theft has occurred and there is no "speculative chain of possibilities" required to establish the certainly impending risk of future harm. *Id.* Hackers have obtained Midway's name and SSN. The only steps left for the hackers are breaking the encrypted vault password and engaging in fraudulent activity. This could happen quickly; the district court noted that "independent researchers were able to decrypt a substantial portion of stolen, encrypted passwords in under two hours." *Midway*, at 4. Additionally, the purpose of the hack is "to make fraudulent charges or assume those customer's identities." *Remijas*, 794 F.3d at 693. The combination of these facts makes it clear that there is a substantial risk of future harm.

3. The Risk of Identity Theft Is Connected to a Harm Traditionally Recognized by Courts

Midway's increased risk of identity theft and fraudulent charges is a concrete, intangible harm because it has a close relationship to the disclosure of private information. In determining concreteness for an intangible harm, courts look for a "close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion*, 141 S. Ct at 2204. Among those "traditionally recognized" is disclosure of private information. *Id.* Datavault's data breach exposed Midway's information, producing the same effect as a disclosure of his private information and qualifying the intangible harm as concrete.

4. The District Court Improperly Applied *Remijas* and Failed to Consider the Presence of Credit Monitoring

The district court relied on a mischaracterization of *Remijas* in *Kylie v. Pearson PLC*. 475 F. Supp. 3d. 841 (2020). *Kylie* stated that "whether a data breach exposes consumers to a material threat of identity theft turns on two factors" derived from *Remijas*: "(1) the sensitivity of the data in question... and (2) the incidence of fraudulent charges and other symptoms of identity theft." *Kylie*, 475 F. Supp 3d. at 841.

Kylie mischaracterized the incidence of fraudulent charges as a dispositive factor in *Remijas*. *Id.* at 846. *Remijas* was a class action case where 350,000 customers' credit card information was stolen, but only 9,200 experienced fraudulent charges. *Remijas*, 794 F.3d at 690. *Remijas* determined that the *entire* class of 350,000 customers satisfied the Article III standing requirement. *Id.* at 697. For those plaintiffs without fraudulent charges, *Remijas* concluded that requiring them to wait for a future harm to materialize in order to satisfy standing would create an argument of causation for defendants. *Id.* at 693. As time increases between the data breach

and the identity theft, the easier it is for a defendant to argue that the identity theft is not caused by the data breach. *Id.* The fact that Midway has not yet experienced fraudulent charges is not dispositive on whether the future harm is concrete because the incidence of fraud was not central to *Remijas*' reasoning. *Midway*, at 8. *Kylie* improperly requires an incidence of fraud for a material threat of identity theft.

Kylie also failed to consider whether the information had already been stolen. *Remijas* considered the presence of theft as a factor in determining whether the risk of future harm is "certainly impending." *Remijas*, 794 F.3d at 693. *Remijas* also identified the offer of credit monitoring as an important factor in identifying a future harm of identity theft as "certainly impending." *Id.* at 694. "It is unlikely that [defendant] did so because the risk is so ephemeral that it can be safely disregarded." *Id.* *Kylie* regarded an offer of credit monitoring as serving a "minor part in standing analysis," which does not follow from *Remijas*. *Kylie*, 475 F. Supp 3d. at 848. Midway's SSN, bank account numbers and routing numbers are very likely to facilitate identity theft and *Kylie*'s characterization of credit monitoring as a miniscule factor should not be credited. The sensitivity of the data in question, Datavault's offering of credit monitoring, and the fact that the data is already stolen demonstrate that the threatened harm is certainly impending. *Midway*, at 5.

Lastly, Midway's harms are distinguishable from the *Kylie* plaintiffs, who lost different types of data: names, emails, birthdays, home address, telephone numbers, and student ID numbers. *Kylie*, 475 F. Supp 3d. at 846. *Kylie* admitted that plaintiff's information could not be 'easily used in fraudulent transactions' and that the data was 'far less likely to facilitate identity theft than the credit and debit card numbers at issue in *Remijas*.' *Id.* at 846-7 (quoting *In re Vtech Data Breach Litigation*, No. 15 CV 10889, 2017 WL 2880102, at *4 (N.D. Ill. July 5,

2017)). Midway's stolen data is far more likely to facilitate identity theft than the stolen data in *Remijas* and *Kylie*.

5. *TransUnion* and *Pierre* Do Not Apply and *Remijas* Remains Good Law

There is no contrary recent precedent that would impact the holding in *Remijas*; neither *TransUnion* nor *Pierre v. Midland Credit Management* dealt with data breaches. *TransUnion*, 141 S. Ct. at 2200; *Pierre*, 29 F.4th 934 (2022). Neither *TransUnion* nor *Pierre* apply to Midway's case because he brings common-law claims, not statutory violations. *TransUnion* violated the Fair Credit Reporting Act (FCRA) by failing to use reasonable procedures to ensure the accuracy of plaintiffs' credit. *TransUnion*, 141 S.Ct at 2200. *TransUnion* placed potential-terrorist flags on plaintiffs' credit files without performing due diligence on the designations. *Id.* at 2201. In addition, *TransUnion* disseminated 1,853 of plaintiffs' (Group A) credit files to third parties. *Id.* at 2200. The main issue involved the 6,332 plaintiffs' (Group B) credit files that included the terrorist mark, but *TransUnion* did not give the files to third parties. *Id.*

Group A had standing because they "demonstrated a concrete reputational harm" from a statutory violation that had a close relationship to a harm traditionally recognized as providing a basis for standing in U.S. courts. *Id.* at 2200, 2204. *TransUnion* identified "reputational harms" as intangible harms that maintain a close relationship to those traditionally recognized by the courts. *Id.* at 2204. Group B only suffered an injury in law and the risk of future harm was not sufficiently concrete: *TransUnion*'s "retention of information unlawfully obtained, without future disclosure, traditionally has not provided the basis for a lawsuit in American Courts." *Id.* (quoting *Braitberg v. Charter Communications, Inc.*, 836 F.3d 925, 930 (2016)).

TransUnion does not apply to Midway's facts and *Remijas* remains good law regarding common law claims. *TransUnion* plaintiffs alleged a statutory violation under the FCRA, and the

holding should be limited to the context of statutory claims. Midway, like the *Remijas* plaintiffs, brought common-law claims of negligence and breach of implied contract. *Remijas*, 704 F.3d. at 690; *Midway*, at 8. *Remijas* still serves as precedent in this Court for common-law claims.

Even if this Court concludes that *TransUnion* is applicable, Midway still has standing. First, Midway's facts are most similar to those of Group A. Third parties actually accessed Midway's and Group A's personal information. Second, both Group A and Midway suffered intangible harms that are closely related to those traditionally recognized as having a basis for lawsuits in U.S. courts. Midway's injuries qualify as concrete because of the intangible future harm's close relationship to disclosure of private information. *TransUnion* indicated "disclosure of private information" as a claim traditionally recognized by U.S. courts. *TransUnion*, 141 S. Ct. at 2204. There is a close relationship between the increased risk from the data breach and disclosure of private information.

Pierre's interpretation of *TransUnion* should be limited to the domain of statutory violations and should not apply to Midway. Although the district court relied on these cases, neither dealt with data breaches, nor common law claims. *Pierre* summarizes *TransUnion*'s conclusion as "a risk of harm qualifies as a concrete injury only for claims for 'forward-looking, injunctive relief to prevent the harm from occurring.'" *Pierre*, at 29 F. 4th 934 (quoting *TransUnion*, 141 S. Ct. at 2210). Although not explicitly stated, this court should conclude that *Pierre* interprets *TransUnion* on the backdrop of injuries in law. *Pierre* mischaracterized *TransUnion*, saying that "a plaintiff seeking money damages has standing to sue in federal court only for claims that have in fact materialized." *Id.* This cannot be applied to common law claims because the harms in *Remijas* had not materialized, but the *Remijas* court determined that the harms were concrete and allowed plaintiffs to proceed with their claims for damages. *Remijas*,

704 F.3d at 697. *Pierre* misinterpreted *TransUnion*'s conclusion that a "plaintiff's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages." *TransUnion*, 141 S. Ct. at 2210. The court should take away the following from *TransUnion*: (1) plaintiffs claiming harms from statutory violations may seek injunctive relief, and (2) plaintiffs claiming harm from statutory violations may not seek monetary damages unless a harm has materialized. *TransUnion* simply reiterated the fact that injuries in law do not automatically constitute injuries in fact. In conclusion, *Pierre* should not serve as precedent to this case because Midway does not allege statutory violations.

Applicant Details

First Name **Trevor**
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 Address

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Applicant Education

BA/BS From **City University of New York-Graduate School & University Center**
 Date of BA/BS **September 2018**
 JD/LLB From **City University of New York School of Law**
<http://www.law.cuny.edu>
 Date of JD/LLB **May 10, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **CUNY Law Journal**
CUNY Law Review
 Moot Court **Yes**
 Experience
 Moot Court Name(s) **CUNY Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships **Yes**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

August 02, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

Of public-service law students nationally, I am the premier clerk prospect. At the #1 public-service law school, I am a law journal editor-in-chief, moot court president, and ACS president. I interned with Detroit's AUSAs, New York State's Senior Associate Judge, and two clinics. And as a high school teacher and college debater, I earned top-three national accomplishments.

I would appreciate your 2024-25 clerkship the most of any applicant because I work the hardest at public-service lawyering, reasoning, and judgment. Few other candidates endured hells like living with a molester until age seven and running away for years. And I welcomed even more challenges by picking principled paths over common shortcuts. Yet I am the applicant with nationally exceptional results in three argumentative arenas—law school, teaching, and debating.

I have some of the strongest possible credentials for a public-service law student. Many aspiring attorneys attend a law school in the "highest tier" they can. And few clerkship applicants would decline the final-editing role on their school's existing law review. But I applied to only CUNY Law because it has 1.8x the rate of public-service law students as the second-place ABA school. And I am exerting thrice the effort to help create a more comprehensive and less theoretical law journal. My classmates made me nationally rare in heading three student groups that mold clerks—a law journal, moot court, and law & policy society.

Few educators nationally rivaled my ability to refine reasoning. Former college debaters tend to train the most privileged high schoolers. But I taught speech & debate at an 11,000th-ranked public school in reading and math. And we suffered discrimination as the nation's only top-300 speech & debate team from a school with over 70% Black or 98% Black and Latinx students. Yet we earned the second-best performance-per-student among U.S. public schools and improved the most spots in the national standings among all schools with under 1400 students.

In a debate league with Columbia, Harvard, Princeton, Stanford, UChicago, and Yale, I had one of the best reputations for rigorous and impartial judgment. I faced immense bias because only I often recruited and partnered with community college students of color. And I put integrity first—my league honored me for helping novices, refusing to win on technicalities, and radiating positivity. Yet I became one of three chief judges for the world's second-most competitive debate event.

I will work to become a great clerk too. You may contact me at (212) 845-9393 and trevor.colliton@live.law.cuny.edu.

Respectfully,
Trevor Colliton

TREVOR COLLITON

trevor.colliton@live.law.cuny.edu | (212) 845-9393

New York Court of Appeals, Senior Associate Judge Jenny Rivera
Judicial Intern (Summer 2023)

U.S. Attorney's Office for the Eastern District of Michigan, Detroit
Legal Intern (Summer 2022)

City University of New York School of Law
J.D. Candidate (2024)

Editor-in-Chief and Founder - *CUNY Law Journal* (2023-24)
President - CUNY Moot Court (2023-24)
President - CUNY American Constitution Society (2022-24)
Student Attorney - Immigrant & Non-Citizen Rights Clinic (2023-24)
Student Attorney - Economic Justice Project Clinic (Spring 2023)
Contracts Teaching Assistant - Professor Deborah Zalesne (2022-23)
Staff Editor - *CUNY Law Review* (Fall 2022)

Achievement First Brooklyn High School

Speech & Debate Teacher (2018-20); Speech & Debate Coach (2018-22)
#1 gain in National Speech & Debate Association rankings among all U.S. schools with under 1400 students (2019-20)
#2 in NSDA performance-per-student among U.S. public schools (2019-20)
Only top-300 team in NSDA rankings from a school with over 70% Black or 98% Black and Latinx students (2019-20)

CUNY Baccalaureate for Unique & Interdisciplinary Studies

B.A., Ethics in Literature (2018)
Chief Adjudicator - North American Debating Championship (2019)
One of three chief judges for world's second-most competitive debate event
President and Founder - CUNY Debate Society (2014-18)
Started and led group representing most linguistically diverse and largest student population of any university debate team globally
Kyle Bean Award - American Parliamentary Debate Association (2018)
One of two who best embodied qualities of former Harvard debater Kyle Bean: welcoming new debaters, exploring interesting topics, making debate fun for all

Law Student Copy Academic Record

Name: Trevor Colliton
Student ID: 15148451

Birthdate: 04/15
Student Address: 8723 57th Ave Apt 2F
Elmhurst, NY 11373-5267
Print Date: 06/07/2023

Other Institutions Attended:

Academic Program History

Program: Law
06/09/2021: Active in Program
06/09/2021: Law JD Major

----- **Beginning of Law Record** -----
2021 Fall Term

<u>Course</u>	<u>Description</u>	<u>Earn</u>	<u>Grd</u>
LAW 701	Contract Law Market Economy I	3.00	CR
Contact Hours:	3.00		
LAW 705	Legal Research	2.00	CR
Contact Hours:	2.00		
Course Attributes:	ZERO Textbook Cost		
LAW 7004	Lawyering Seminar I	4.00	CR
Contact Hours:	4.00		
LAW 7043	Liberty Equality & Due Process	3.00	CR
Contact Hours:	3.00		
LAW 7131	Crim L-Rsp Inj Condu	3.00	CR
Contact Hours:	3.00		

2022 Spring Term

<u>Course</u>	<u>Description</u>	<u>Earn</u>	<u>Grd</u>
LAW 702	Contracts: LME II	3.00	A
Contact Hours:	3.00		
LAW 709	Civil Procedure	3.00	A-
Contact Hours:	3.00		
LAW 7005	Lawyering Seminar II	4.00	A
Contact Hours:	4.00		
LAW 7141	Torts-Rsp Inj Conduc	3.00	A
Contact Hours:	3.00		
LAW 7161	Law and Family Relations	2.00	B
Contact Hours:	2.00		

Academic Standing Effective 06/28/2022: Good Academic Standing

2022 Fall Term

<u>Course</u>	<u>Description</u>	<u>Earn</u>	<u>Grd</u>
LAW 7192	Constitutional Structures	3.00	A-
Contact Hours:	3.00		
LAW 7251	Public Institutions/Admin Law	3.00	A
Contact Hours:	3.00		
Course Attributes:	ZERO Textbook Cost		
LAW 7292	Evidence-L&Pub Int I	4.00	B+
Contact Hours:	4.00		
LAW 7531	New York Practice	4.00	A
Contact Hours:	4.00		
LAW 7723	Teaching Assistant	2.00	A
Contact Hours:	3.00		

Academic Standing Effective 01/18/2023: Good Academic Standing

2023 Spring Term

<u>Course</u>	<u>Description</u>	<u>Earn</u>	<u>Grd</u>
LAW 738	Professional Responsibility	2.00	A
Contact Hours:	2.00		
LAW 798	Public Benefits	3.00	A

<u>Course</u>	<u>Description</u>	<u>Earn</u>	<u>Grd</u>
Contact Hours:	3.00		
LAW 825	Lawyering Seminar III	4.00	B+
Course Topic:	ECON JUSTICE PROJECT		
Contact Hours:	4.00		
LAW 7151	Property: Law & Market Eco III	4.00	A
Contact Hours:	4.00		
Course Attributes:	Low Textbook Cost		
LAW 77214	Moot Court	2.00	CR
Contact Hours:	2.00		
LAW 7723	Teaching Assistant	2.00	A
Contact Hours:	3.00		
2023 Fall Term			
<u>Course</u>	<u>Description</u>	<u>Earn</u>	<u>Grd</u>
LAW 739	Voting Rights		
Contact Hours:	3.00		
LAW 808	Land Use & Community Lawyering		
Contact Hours:	2.00		
LAW 810	Immig & Non-Citizen Rts Clinic		
Contact Hours:	8.00		
LAW 7726	Topics In Law		
Course Topic:	Approaches to Discrimination		
Contact Hours:	3.00		

End of Law Student Copy Academic Record

June 19, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am writing to add my highest recommendation to the candidacy of Trevor Colliton for a federal judicial clerkship in your chambers. Based on my experience with Mr. Colliton over the past two years, I find him to be an extraordinarily bright and highly-motivated student.

Mr. Colliton was a student in my Contracts class for two semesters in his first year of law school. In both classes he distinguished himself in every possible way. He's a thoughtful individual who has excelled at everything I have seen him attempt. He had little trouble grasping the nuance and reasoning of the case law from the beginning of the year, reading cases with attention to detail and using them effectively to make persuasive legal arguments. His legal reasoning is logical and deep, and his writing is clear, well-organized, and persuasive. These skills earned him one of only a few A's in the large lecture class both semesters. I would easily rank him among the top five percent of students I have taught over the past twenty-five years.

In class, Mr. Colliton was a frequent participant, consistently challenging assumptions and raising important issues in a thoughtful way. It was clear early on that his extensive and highly-successful experiences in debate during college, and teaching and coaching debate before law school, contributed to a confident and persuasive legal advocate in the making.

Based on Mr. Colliton's maturity, understanding of the law, and commitment to justice, I sought him out as a teaching assistant for Contracts this past year. In that capacity, he held weekly office hours, tutored individual students, provided feedback on writing assignments, and conducted several review sessions for the entire class. Needless to say, Mr. Colliton's work was exceptional. The students found him approachable and knowledgeable about contract law and consistently fought to be in his section; and I found his assistance with course materials invaluable.

On top of everything else, Mr. Colliton is very active and highly regarded in the law school community. He has taken many leadership roles and commands great respect from both his fellow students and from faculty. He is exceptionally smart, passionate about CUNY Law's public service values, and eager to implement them in his work. It goes without saying that I would welcome the opportunity to work with him on any future project during his time at the law school.

In sum, I am confident Mr. Colliton will continue to distinguish himself in whatever endeavors he undertakes. I recommend him without hesitation. If you would like any additional information, please feel free to call me at 646.637.3708.

Sincerely,

Deborah Zalesne
Professor of Law

Deborah Zalesne - Zalesne@law.cuny.edu - _718_ 340-4328

August 02, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Re: Trevor Colliton

Dear Judge Swank:

I highly recommend Trevor Colliton for a clerkship in your chambers. Based on my past experience as a federal appellate clerk and my observation of Trevor's coursework and extracurricular activities during law school, I am confident that he possesses the analytical acumen necessary to assess competing arguments and resolve complex disputes for the right reasons.

I was fortunate to have the opportunity to supervise Trevor's work in the Economic Justice Project (Public Benefits), a law school clinic I co-direct that operates both as a live-client clinic and a doctrinal course in social welfare law and policy with an emphasis on administrative law and civil procedure. Trevor's diligent work in the clinic demonstrated his dedication to expanding access to higher education and public benefits for low-income college students.

Trevor's commitment to legal excellence truly stands out, however, in his commitment to oral advocacy and appellate brief-writing in the competitive work of Moot Court. There, he has put in countless hours to conduct independent research and construct arguments relating to highly complicated legal issues currently facing the federal courts. As a result, he has developed the ability to look beneath the surface of opposing arguments to evaluate the strengths or weaknesses of their foundational premises.

Trevor also brings strategic skills from his internship with the U.S. Attorney's Office for the Eastern District of Michigan, and he will continue to hone his legal research and writing skills this summer as a judicial intern for New York Court of Appeals Senior Associate Judge Jenny Rivera.

Trevor is sharp, thoughtful, and personable. He balances healthy skepticism with an open mind. In short, Trevor would make an invaluable contribution to the work of the court. I would be pleased to speak with you should you require any additional information regarding Trevor's candidacy. Thank you very much for your time and attention.

Sincerely,

/s/ Lynn D. Lu
Associate Professor of Law

Lynn Lu - lynn.lu@law.cuny.edu - (718) 340-4601

August 02, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am honored to write on behalf of Trevor Colliton, whom I have known for the last five years. In 2018-19, Trevor was my assistant teacher at Achievement First Brooklyn High School, a charter school serving a predominantly Black and Latinx population where most of the students qualified for free or reduced lunch and became the first in their family to attend college. Specifically, Trevor supported me as a debate coach, leading after-school practices and daily classes to support our students across various debate categories. Trevor's job was a demanding one that not only entailed teaching argumentation but additionally building a culture that enabled students who had been systematically marginalized to find their voice and hold their own in a competitive debate world dominated by wealthy white students from private schools. But thanks to Trevor's talent and work ethic, that was our most successful season. That year, several of our students won awards at Princeton, one of our students won the New York State Championship, and one even won Harvard.

Trevor may be the smartest person I have ever met. He has an archive-like memory that came in handy when helping students prepare cases. Ask him who was vice president in 1836, or what the capital of Lithuania is, or what currency they use in Uganda, and he will tell you offhand. His training as a collegiate debater allows him to process arguments and plan rebuttals with impressive speed. He has been chosen to serve on judging panels at elite collegiate debate competitions and he is respected on the national and international debate circuits.

In addition to being a brilliant thinker, Trevor is relentless. There were many nights we would be the last ones in the school building and the security guards would have to shoo us out the door at 9pm. There were many Saturday mornings waking up at 5am to take kids to tournaments. There were many weeks in a row where Trevor didn't get a break from teaching or tournaments, but his enthusiasm never waned, even for a moment. When I left that June, Trevor led the Speech & Debate program on his own the following year and kept the team alive during the challenges of COVID.

I have no doubt Trevor will make a terrific clerk due to his breadth of knowledge, impressive memory, relentless tenacity, and deep moral integrity. I cannot offer him a stronger recommendation.

Very sincerely yours,
K.M. DiColandrea

K.M. DiColandrea - k.m.dicolandrea@gmail.com - (917) 680-9094

Writing Sample I - Trevor Colliton

I often write for fun. This is an example from a few days ago. No one gave me feedback on it. I argued that the Sixth Circuit uses too strict a test to decide when social media accounts are state actors.

The Supreme Court’s “composition-and-workings test” should dictate when social media accounts are state actors. State actors must comply with the Fourteenth Amendment. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Governments are not the only state actors. *Id.* For example, an interscholastic athletics association was a state actor when overwhelmingly composed of public-school officials and working to help their schools. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 298-99 (2001). Public-school officials composed 84% of the association’s members and 100% of its leaders. *Id.* at 291, 299. The association worked to regulate sports between its high schools. *Id.* at 298-300. That composition-and-workings test can assess state action whenever *any* private entity involves public officials and helps government.

Yet the Sixth Circuit created a “duty-or-authority requirement” that finds social media accounts to be state actors in only two ways. *Lindke*

v. Freed, 37 F.4th 1199, 1203-04 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023). One way is that a public official has a duty to use the account. *Id.* The other way is that an official needs state authority to use the account as they do. *Id.* In *Lindke*, an appointed city manager posted on Facebook about personal and job matters. *Id.* at 1201. Under some of those posts, a citizen criticized local pandemic policies. *Id.* at 1201-02. Then the city manager blocked the citizen from commenting on his page. *Id.* at 1202. The Sixth Circuit held that the city manager had no duty to run the Facebook account because no law compelled or state budget funded it. *Id.* at 1204-05. And they doubted that the city manager invoked his authority because no staffers helped operate his page, not all communications with constituents are government work, and his posts did not carry force like police officers' commands. *Id.* at 1205-06. The court conceded their duty-or-authority requirement "part[s] ways with other circuits' approach to state action" on social media. *Id.* at 1206. But more importantly, the Sixth Circuit strayed from Supreme Court precedent in four respects.

First, a private entity appears to be a state actor when composed of only a public official. An entity seems like government if it would be

unrecognizable without public officials' involvement. *Brentwood*, 531 U.S. at 300. When a social media account's sole administrator is a public official, it is 100% controlled by representatives of the state—more than *Brentwood*'s 84%. *See id.* at 299-300. And an entity presents a public identity unless enough purely private actors distinguish it from the state. *See id.* In *Lindke*, the city manager did not collaborate with civilians on his Facebook account. *See* 37 F.4th at 1201. Yet the Sixth Circuit found him to be a private actor partially because he did not recruit other public officials to help run the account. *Id.* at 1205.

Second, a public official works when they represent constituents. That includes when their job descriptions do not require them to. The *Brentwood* public-school officials' duties did not explicitly involve joining an interscholastic athletics association. *See* 531 U.S. at 299. But a job description is “one fact” that cannot “function as a necessary condition across the board for finding state action.” *See id.* at 295-96. Instead, courts must use “normative judgment” about a “range of circumstances” to decide whether it is fair to attribute conduct to the state. *Id.* In *Brentwood*, nearly all high schools in the state spent money on sports competitions. *Id.* at 299. The competitions were an “integral

part” of education. *Id.* So the only rational view was that school officials represented their students while serving the association. *Id.*

Public executives represent people too. In *Lindke*, even the city manager believed his regular interactions with locals were “essential to good government.” 37 F.4th at 1205. Yet the Sixth Circuit found such conversations on Facebook private. *Id.* The court said that a public official could have a duty to use social media for only two reasons. *Id.* One reason is that an official uses government funds to run an account. *Id.* The other reason is that a law forces an official to use an account. *Id.* The Sixth Circuit drew these “bright lines” to make the doctrine more predictable. *Id.* at 1206-07. But the Supreme Court did not want to let public officials escape liability based on technicalities—“criteria [with] rigid simplicity.” *See Brentwood*, 531 U.S. at 295. The Supreme Court finds state action where civilians think an official represents the public. *See id.* at 299.

Third, a public official works when they informally communicate with constituents about government matters. In *Brentwood*, the private interscholastic association helped school officials agree to and enforce a rules scheme. *Id.* The officials’ conversations about rules were informal

in that the state had long claimed the association was private. *Id.* at 300. Still, the association was a state actor. *Id.*

Public executives often talk informally too. They might discuss their work with constituents outside government buildings or state-approved meetings. *See Lindke*, 37 F.4th at 1205. Yet the Sixth Circuit cited no authority for why government communications can be state action only if formal. *See id.* The court merely reasoned that public officials will be too burdened if *every* informal conversation they have with constituents is state action. *See id.*

Fourth, a public official works when they purport to exert state influence. While a deputized person was an amusement park employee, his ordering Black people to leave, arresting them, and pressing charges against them were state action because he self-identified as a police officer. *Griffin v. Maryland*, 378 U.S. 130, 131, 135 (1964). But the police are not the only public officials who can be state actors while purporting to act for the government. The *Griffin* court held that liability extends to “an individual [] possessed of state authority” even if “he might have taken the same action . . . in a purely private capacity or [] the particular action which he took was not authorized by state law.”

Id. at 135. The court did not limit liability to those who have policing authority, take actions of force, or are subject to regulations on law enforcement. *See id.* All three other circuit courts that decided the issue recognized that non-police officials could be state actors when purporting to use their powers. *See Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019) (President), *vacated as moot sub nom. Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021); *Davison v. Randall*, 912 F.3d 666, 680-81 (4th Cir. 2019) (Chair of County Supervisors); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1177 (9th Cir. 2022) (Public-School District Trustees), *cert. granted*, 143 S. Ct. 1779 (2023). Yet the Sixth Circuit held that only the police can be state actors while pretending to act for the government because people must obey their directions. *See Lindke*, 37 F.4th at 1206.

Thus, the Sixth Circuit's duty-or-authority requirement is too strict to decide when social media accounts are state actors.

Applicant Details

First Name	Mason
Middle Initial	T
Last Name	DuMars
Citizenship Status	U. S. Citizen
Email Address	mason.dumars@comcast.net
Address	<div><div>Address</div><div>Street</div><div>412 North Ave W</div><div>City</div><div>Missoula</div><div>State/Territory</div><div>Montana</div><div>Zip</div><div>59801-6707</div><div>Country</div><div>United States</div></div>
Contact Phone Number	5058505478

Applicant Education

BA/BS From	University of New Mexico
Date of BA/BS	May 2020
JD/LLB From	University of Montana School of Law
	http://www.umt.edu/law/
Date of JD/LLB	May 10, 2024
Class Rank	25%
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	Yes
----------------------------------	-----

Post-graduate Judicial Law Clerk No

Specialized Work Experience

Recommenders

Brian, Morris
Brian_Morris@mtd.uscourts.gov
(406) 422-3053
Brown, Steve
Steve.Brown@mso.umt.edu
Conley, Anna
anna.conley@mso.umt.edu
(406) 830-0367

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Mason T. DuMars

412 North Ave. W., Missoula, Montana | (505) 850-8478 | mason.dumars@umontana.edu

Vj g'J qpqtcdrg"Kimberly A. Swank
United States Courthouse
201 South Evans St., Rm 209
Greenville."P E"47858

F gct"lwf i g'Swank."

I am a rising third-year student at the Blewett School of Law at the University of Montana. I am very interested in assisting you and your staff as a Law Clerk for the 2024 Term. I have been fortunate to gain real-world experience in a wide variety of criminal and civil matters in Montana, and I believe I would be a good fit for your chambers. If selected, I will timely and diligently draft memoranda. research novel legal issues, and perform all other responsibilities required of me as a Clerk.

Kj cxg"rxgf "o { "gpvkg'hkg"lp"vj g'y guvtp"Wpkgf "Ucvgu dw'y cu'f tcy p"q"cr r n{ "q"qwt"ej co dgtu'cu"Kpqy "j cxg" uki plhcepv"lgu"q"P qty "Ectqkpc00 { "dtqv gt "ku'ewttgpw{ "y kj "vj g'5tf "Ur geknHqtegu"t qwr "ucvkgpgf"cv'Hk0Dtc i " lp"Hc{ gwgxkmg0J ku'f gr n{ o gpw'cu'c'Ur geknHqtegu"Y gcr qpu'Ugti gcpv'ctg"htgs wgpv'cpf "I would enjoy the opportunity to spend time with him and his young children while he remains on active duty.

Throughout law school, I have enjoyed collaborating with my fellow law students and working with some of the student-run organizations. This past fall, I assisted in the creation of a new student group, the UM Fly Fishing Society, which focuses on wildlife and natural resource law while also stressing the importance of having hobbies outside of the law, all of which I am passionate about.

During my 1L Summer, I attended Vanderbilt University Law School and enrolled in international law courses. The courses addressed niche issues of international law and gave me a broader perspective on subject matters I had never considered. The program also enhanced my legal research and writing skills. My favorite course at Vanderbilt was Comparative Perspectives on Counterterrorism. This class provided a unique introduction to international criminal law and the law of war. Starting law school, I never intended to pursue criminal law, yet my experience at Vanderbilt piqued my interest in criminal law which led me to pursue a clinical placement with the U.S. Attorney's Office in the fall of 2023.

My work experience in private practice during my 2L year and at the U.S. District Court for the District of Montana Great Falls Division this summer has strengthened my legal writing and research skills tremendously. I have learned how to efficiently research and prepare working memorandums on both federal and Montana law. Working in Judge Morris's chambers provided me the opportunity to spend four days per week in the courtroom to observe criminal hearings and civil oral arguments, as well as analyze legal issues through the lens of a neutral decision-maker rather than as an advocate. These experiences have sparked my interest in clerking and streamlined my writing and research abilities in a way that allows me to approach new projects with confidence.

I believe my background and professional experiences, along with my interest in multiple areas of the law, will allow me to proactively assist you if given the opportunity to clerk in your chambers. I intend on returning to Montana to start a small practice but would love the opportunity to begin my career in North Carolina learning from you. Thank you for your time and consideration.

Respectfully,


Mason T. DuMars

Mason T. DuMars

412 North Ave. W., Missoula, MT 59801 • (505) 850-8478 • mason.dumars@umontana.edu

EDUCATION

University of Montana, Alexander Blewett III School of Law, Missoula, MT

J.D. Candidate, May 2024

Activities: Environmental Law Group - Member
UM Law Fly Fishing Society – Founder, Vice President
Maritime Law Group – President
Clinical Intern – U.S. Attorney’s Office, District of Montana

Vanderbilt University Law School • International Law Program, Nashville, TN

Summer 2022

Courses: Transnational Litigation, Counterterrorism Law, and International Arbitration

University of New Mexico, Albuquerque, NM

B.A., in Psychology and Political Science, May 2020

Honors: Multiple Semester on Dean’s List; Member of the UNM Honors College

EXPERIENCE

Chief Judge Brian Morris, U.S. District Court, Great Falls, MT

Summer 2023

Judicial Intern

Attended Motions Hearings, Criminal Proceedings, and Civil Trials with Judge Morris and his term clerks. Conducted research in various areas of Federal and State law, Reviewed briefings, Prepared Orders, Sentencing Memorandums, and Bench Memorandums for Judge Morris. Attended Arraignments and Mediations with Magistrate Judge Johnston.

Worden Thane P.C., Missoula, MT

July 2022 – Present

Student Law Clerk

Experience civil litigation and transactional work. Drafted Memos, Motions, and Briefs with attorney supervision, conducted highly detailed legal research, tracked time and billable hours. Met and interacted with numerous attorneys and clients on various issues such as real property disputes, guardianship matters, natural resource law, estate planning, and general civil defense.

Law & Resource Planning Associates, Albuquerque, NM

June 2020 – July 2021

Legal Assistant

General office duties, calendaring, answering phones, filing, and email organization. Completed basic legal research and document drafting with Attorney supervision. Organized and prioritized work to complete assignments in a timely, efficient manner.

Pelicans Restaurant, Albuquerque, NM

Dec. 2018 – Feb. 2020

Lead Server

Provided excellent customer service at a local fine dining restaurant. Assisted co-workers in all aspects of food service and preparation. Refined my ability to multitask effectively and prioritize tasks.

University of New Mexico (Resident Life & Student Housing), Albuquerque, NM

Student Supervisor

Jan. 2018 – Nov. 2018

Managed a small team of student peers at student housing and apartments. Tasks included scheduling, handling of all resident mail, organizing housing-keeping, and general building maintenance. Organized meetings with the building's resident assistants regarding rules, regulations, and other related issues.

ADDITIONAL INFORMATION

Languages: English, Basic Spanish

Interests: Running, Fly-Fishing, Rafting, Skiing, Hiking, Climbing, Weightlifting, Cooking

REFERENCES

Stephen R. Brown
Adjunct Professor and Associate Water Judge
steve.brown@mso.umt.edu

William E. McCarthy, Esq.
Senior Partner, Worden Thane P.C.
wmccarthy@wordenthane.com

Brian Morris
Chief Judge, U.S. District Court, District of Montana
bmm@mtd.uscourts.gov

John Johnston
U.S. Magistrate Judge, U.S. District Court, District of Montana
John_Johnston@mtd.uscourts.gov

Alexander Blewett III
SCHOOL OF LAW
UNIVERSITY OF MONTANA



**THE ALEXANDER BLEWETT III SCHOOL OF LAW
AT THE UNIVERSITY OF MONTANA
OFFICIAL GRADE POINT AVERAGE VERIFICATION**

June 1, 2023

This letter is to certify that **MASON DUMARS** is a full-time student in good standing in this school of law and is eligible to continue. He has successfully completed 68 credits. Ninety credits total is needed to graduate from this school of law.

As part of Mr. Dumars' degree program he has taken courses from Vanderbilt University as well as the Alexander Blewett III School of Law at the University of Montana. The University of Montana does not automatically include law courses taken from other institutions in their final GPA calculations but the Alexander Blewett III School of Law does. Consequently Mr. Dumars' official GPA is different than reported on the official University of Montana transcript. **Mr. Dumars' official law school grade point average is 3.43.** He is expected to graduate in May 2024.

The Alexander Blewett III School of Law at the University of Montana is an ABA accredited program. If you have any questions or would like further clarification please contact me at any time.

Sincerely,

Charity Atteberry
Assistant Dean, Student Success | Director of Student Services | Registrar
Alexander Blewett III School of Law at the University of Montana
charity1.atteberry@umontana.edu
(406) 243-2690



Student No: 790894411

Date Issued: 30-MAY-2023

Record of: Mason T. Dumars
Current Name: Mason T. Dumars

U N O F F I C I A L Page: 1

Course Level: Professional
Matriculated: School of Law Autumn 2021

Current Program
Major : Law

SUBJ NO.	COURSE TITLE	CRED GRD	PTS R	SUBJ NO.	COURSE TITLE	CRED GRD	PTS R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:				Institution Information continued:			
202250 Vanderbilt University				Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 54.00 GPA: 3.60			
LAW 7068 Comp Perspec Counter Te 2.00 A				Good Standing			
LAW 7252 International Arbitration 2.00 A				School of Law Spring 2023			
LAW 7718 Transnational Litigation 2.00 B+				Law			
Ehrs: 6.00 GPA:				LAW 511 Crim Pro: Investigative 3.00 A- 11.10			
INSTITUTION CREDIT:				LAW 541 Pretrial Litigation 3.00 B+ 9.90			
School of Law Autumn 2021				LAW 555 Professional Responsibility 3.00 B- 8.10			
Law				LAW 557 Trial Practice 2.00 CR 0.00			
LAW 500 Civil Procedure 4.00 B 12.00				LAW 651 Oil and Gas Law 3.00 A- 11.10			
LAW 502 Contracts 4.00 A 16.00				LAW 663 Water Law 3.00 B 9.00			
LAW 506 Law Fund: Research 2.00 B- 5.40				Ehrs: 17.00 GPA-Hrs: 15.00 QPts: 49.20 GPA: 3.28			
LAW 508 Law Fund: Legal Analysis 2.00 B 6.00				Good Standing			
LAW 510 Criminal Law 3.00 B 9.00				School of Law Autumn 2023			
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 48.40 GPA: 3.22				IN PROGRESS WORK			
Good Standing				LAW 534 Intro to Intellectual Property 3.00 IN PROGRESS			
School of Law Spring 2022				LAW 538 Art & Cultural Property 2.00 IN PROGRESS			
Law				LAW 600 Clinic: USDOJ-Missoula 2.00 IN PROGRESS			
LAW 509 Legal Writing 3.00 B- 8.10				LAW 616 Appellate Advocacy 3.00 IN PROGRESS			
LAW 512 Torts 4.00 A 16.00				LAW 628 Remedies 3.00 IN PROGRESS			
LAW 550 Property 4.00 B+ 13.20				LAW 630 Lawyers' Values 3.00 IN PROGRESS			
LAW 558 Constitutional Law 4.00 A- 14.80				In Progress Credits 16.00			
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 52.10 GPA: 3.47				***** TRANSCRIPT TOTALS *****			
Good Standing				Earned Hrs GPA Hrs Points GPA			
School of Law Autumn 2022				TOTAL INSTITUTION 62.00 60.00 203.70 3.39			
Law				TOTAL TRANSFER 6.00			
LAW 556 Business Transactions 3.00 A- 11.10				OVERALL 68.00			
LAW 560 Evidence 3.00 B 9.00				***** END OF TRANSCRIPT *****			
LAW 650 Intro to Environmental Law 3.00 B+ 9.90							
LAW 659 Estate Planning 3.00 A 12.00							
LAW 690 Crim Pro: Adjudicative 3.00 A 12.00							
***** CONTINUED ON NEXT COLUMN *****							



Stephen R. Brown
(406) 240-5380
steve.brown@mso.umt.edu

August 7, 2023

Hon. Kimberly A. Swank
U.S. District Court for the Eastern District of North Carolina
201 South Evans St., Rm 209
Greenville, NC 27858

Re: Mason Dumars Letter of Recommendation

Dear Judge Swank:

I write to recommend Mason Dumars for a judicial clerkship. I know Mason as an outstanding rising third year law student at the Blewett Law School at the University of Montana. I have no doubt he will be a great judicial clerk.

I send this letter in my capacities as both an adjunct professor and as a judge with the Montana Water Court. I have had the privilege of being Mason's professor for several law school classes, including Torts during his first year, and Introduction to Environmental Law and Oil and Gas Law this past year. His work was excellent in each class. As a judge, I also see Mason as someone who will be easy to work with and who will consistently produce quality work.

Mason is bright and hard-working. He analyzes issues carefully and analytically. He shows attention to detail in his writing. His work is well-organized, and he is skilled at explaining his analysis persuasively and credibly. I've enjoyed getting to know Mason and I highly recommend him for a clerkship.

Please feel free to contact me if I can provide any additional information.

Sincerely,

Stephen R. Brown

Stephen R. Brown
Judge and Adjunct Professor

Mason T. DuMars

412 North Ave. W., Missoula, Montana | (505) 850-8478 | mason.dumars@umontana.edu

Writing Sample

The attached writing sample is an order I drafted during my internship at the United States District Court. The order denying the Plaintiff's motion to amend was prepared for Chief Judge Brian Morris.

To preserve confidentiality, all individual names and locations have been changed, and some portions have been redacted. I have received permission from Judge Morris to use this order as a writing sample.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

ESTATE OF JOHN DOE

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

CV-

**ORDER ON MOTION
TO AMEND COMPLAINT**

INTRODUCTION

Plaintiff filed a Motion to Amend Complaint on April 10, 2023, to include a specific claim under the Emergency Medical Treatment and Active Labor Act (“EMTALA”) or alternatively, permit the claim in the Plaintiff’s current Complaint subject to Fed. R. Civ. P. 16(b). (Docs. 1, 19 and 20.) Defendant argues, in opposition, that EMTALA does not waive the United States’s sovereign immunity, therefore, amending the Complaint to include an EMTALA claim would be futile. For the reasons detailed below, the Court denies Plaintiff’s Motion to Amend.

PROCEDURAL BACKGROUND

Tribal Nation law enforcement personnel transported John Doe to the Indian Health Services (“IHS”) Center on May 10, 2020. (Doc. 1 at 3.) John Doe was

suffering from a skull fracture and subdural hematoma from an apparent blunt force injury. (*Id.*) Treating physicians at the IHS examined and cleared John Doe to be held at the Tribal Detention Center. Tribal Law Enforcement transferred John Doe to the Tribal Detention Center and placed him in the “drunk tank.” (*Id.* at 3-4.) John Doe died at the Tribal Detention Center just a few hours after discharge from the IHS. (Doc. 1 at 4.)

Plaintiff filed a timely Administrative Claim for relief with the appropriate federal agencies under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2675(a), on June 26, 2021. (Doc. 20-2 at 1.) Plaintiff alleged that Dr. Jack Jones was negligent when he medically cleared John Doe to be taken to the Blackfoot detention facility on May 10, 2020. (Doc. 20 at 2.) The U.S. Department of Interior acknowledged that the Administrative Claim also alleged that the Indian Health Services (“IHS”) physicians who treated John Doe were negligent in their medical care. (Doc. 20-4.) The Department of Interior denied Plaintiff’s administrative tort claim on January 31, 2022. (Doc. 20 at 2.)

Plaintiff filed the Complaint in this matter on April 29, 2022. (Doc. 1.) Plaintiff alleges various claims of negligence against the Bureau of Indian Affairs (“BIA”), IHS, and the Tribal Detention Center where John Doe died.

The facts alleged focus on the Tribal Detention Center's officers' conduct, as well as Dr. Jones's conduct and his alleged failure to "perform and review diagnostic testing," "to perform additional checks and testing," and "to properly advise Tribal Law Enforcement of the Plaintiff's condition." (Doc. 1 at 9, 13, 15.)

Defendant learned that Dr. Jack Jones served as an independent contractor rather than an IHS employee of the IHS facility in [REDACTED], Montana on August 24, 2022. (Doc. 20 at 4.) Plaintiff inquired into Dr. Jones's employment status during discovery. Plaintiff learned on November 4, 2022, that Dr. Jones, was not an "employee" of IHS for purposes of the FTCA on the day Dr. Jones examined John Doe. (Doc. 20 at 8.) The FTCA's limited waiver of sovereign immunity excludes "any contractor with the United States" from the definition of "[e]mployee of the government." 28 U.S.C. § 2671. Courts have construed this language as the "independent contractor exception" which protects the United States from vicarious liability for the negligence of its independent contractors. *Sisto v. United States*, 8 F.4th 820, 824 (9th Cir. 2021) (citing *Edison v. United States*, 822 F.3d 510, 518 (9th Cir. 2016)).

The deadline to amend pleadings in this matter ran on October 14, 2022. (Doc. 10 at 1.) The deadline to disclose experts lapsed on March 17, 2023 (Doc. 10 at 2) and the parties have made these disclosures. Neither the Complaint nor Plaintiff's discovery responses reference a EMTALA claim.

STANDARD OF REVIEW

Rule 15(a)(2) of the Federal Rules of Civil Procedure directs that “courts should freely give leave [to amend] when justice so requires.” Courts consider “the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment,” when assessing whether leave to amend is proper. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538. Once a district court has entered a scheduling order pursuant to Rule 16 setting a timetable for amending pleadings, Rule 16(b) governs the plaintiff’s ability to amend the complaint rather than Rule 15(a). *Johnson v. Mammoth Recreation, Inc.*, 975 F.2d 604, 607–08 (9th Cir. 1992) (affirming denial of a belated motion to amend). When a court-ordered deadline for amending the pleadings has already expired, the proposed amendment must be supported by a showing of “good cause.” *Id.* at 608. “[E]ven under the liberal Rule 15 standard ‘late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action.’” *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000); *see also In Re Western States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d 716 (9th Cir. 2013) (upholding denial of motion to amend where “the party seeking to modify the scheduling order has been aware of the facts and theories supporting amendment

since the inception of the action.”)

ANALYSIS

Plaintiff insists that good cause exists to allow the EMTALA claim to proceed. (Doc. 20 at 8.) Plaintiff alleges that the government failed to inform them that Dr. Jones was not an employee for purposes of the FTCA for more than one year after filing the administrative tort claim (*Id.*) Plaintiff alleges they confirmed information in November 2022. Plaintiff argues that they would have approached the medical negligence theories differently had he been informed of Dr. Jones’ status earlier. (*Id.*) Plaintiff further alleges that Defendant suffers no prejudice by permitting the EMTALA claim. (*Id.* at 9.) Plaintiff insists that they properly identified the underlying acts and omissions constituting medical negligence in Count II of the complaint, therefore the conduct underlying the proposed EMTALA Claim was contained in the Complaint. (*Id.*)

I. EMTALA

The Court determines that denial of Plaintiff’s request for leave to amend the Complaint is warranted at this juncture under both Rules 15 and 16. “Futility of an amendment can, by itself, justify denial of a motion to for leave to amend.” *Kroessler v. CVS Health Corp.*, 977 F.3d 803 (9th Cir. 2020). If no amendment would allow the complaint to withstand dismissal as a matter of law, courts consider amendment futile. *Moore*, 885 F.2d at 538–39.

The United States stands as sole defendant in this matter. The United States as a sovereign, remains immune from suit unless it consents to be sued. *See United States v. Sherwood*, 312 U.S. 584, (1941). A waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.” *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4, 89 (1969)). The party who sues the United States bears the burden of pointing to such an unequivocal waiver of immunity. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983). “Federal courts lack subject matter jurisdiction over a claim against the United States absent a waiver of sovereign immunity by the United States.” *Mitrano v. United States*, No. CV-16-13-GF-BMM, 2017 WL 499905, at *1 (D. Mont. Feb. 7, 2017) (citing *Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)).

The FTCA contains a limited waiver of sovereign immunity for claims arising from injuries allegedly “caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” 28 U.S.C. § 1346(b)(1). The language of EMTALA contains no such waivers. EMTALA’s pertinent language regarding liability is as follows:

[a]ny individual who suffers personal harm as a direct result of a participating hospital’s violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

42 U.S.C. § 1395dd(d)(2)(A). EMTALA fails to reference the United States government in any capacity, and, therefore, lacks the requisite express waiver of sovereign immunity. *Majeed v. Atlanta Veteran Affs. Med. Ctr.*, No. 1:18-CV-01037-ELR, 2020 WL 11192845, at *5 (“A plain reading of the text shows that the statute does not mention the United States government or any hospital owned or maintained by the United States. EMTALA thus lacks an ‘unequivocally expressed’ waiver of sovereign immunity.”)

The language of the FTCA further evidences the futility for amendment. The FTCA is the exclusive remedy “for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” 28 U.S.C. § 2679. The FTCA bars an addition of an independent negligence claim against the United States. (*Id.*)

The Court agrees with Defendant that the United States did not waive its sovereign immunity with the enactment of EMTALA. Plaintiff’s proposed amendment to include an EMTALA claim against the United States proves futile. An EMTALA claim cannot be brought against the United States as a sole party in this matter. Plaintiff’s request to amend the EMTALA claim may have proved more persuasive if Plaintiff had Plaintiff joined Dr. Jones as an additional Defendant.

II. Good Cause

Plaintiff's failure to establish good cause for relief from the Scheduling Order under Rule 16 further warrants denial. *See* (Doc. 10.) Plaintiff insists it "recently learned" of the most applicable legal theory in this case. Plaintiff asserts it was first informed of possible EMTALA violations when speaking with expert Dr. Daubert in March of 2023. Dr. Daubert's expert report, dated March 11, 2022, opines that Dr. Jones violated EMTALA, among other standards of care. The deadline for amending the pleading remained open until October 14, 2022. Plaintiff took no steps over the next seven months to amend the Complaint to include potential EMATALA violations. Plaintiff contends that it would have approached the medical negligence theories differently had he been advised that Dr. Jones was not technically an "employee" for purposes of the FTCA. The date of Dr. Daubert's report provided Plaintiff ample opportunity to add or develop claims against Dr. Jones.

Plaintiff argues that they did not formally confirm Dr. Jones's employment status until November of 2022 through the discovery process. This Court identified Dr. Jones's status as a contract physician for IHS in October of 2022, before the amendment deadline. [REDACTED] v. *United States*, No. CV-[REDACTED]-GF-BMM, [REDACTED], at *2 (D. Mont. Oct. 5, 2022). Plaintiff has failed to demonstrate sufficient diligence in determining Dr. Jones's employment status. Dr. Jones's

employment status was made known by this Court before the October 14, 2022, amendment deadline, and six months before Plaintiff filed its motion to amend on April 10, 2023. Plaintiff could have added an EMTALA claim before the amendment deadline even without knowing Dr. Jones's employment status but failed to do so.

CONCLUSION

Plaintiff's requested leave to amend the Complaint proves futile as EMTALA does not provide a waiver of the United States' sovereign immunity. Plaintiff has also failed to establish good cause as required by Rule 16.

ORDER

Accordingly, **IT IS ORDERED** that Plaintiff's Motion to Amend the Complaint (Doc. 19) is **DENIED**.

Dated this ____ day of June, 2023.

Applicant Details

First Name	Benjamin
Middle Initial	J
Last Name	Kelly
Citizenship Status	U. S. Citizen
Email Address	bkelly0413@gmail.com
Address	<div> <div>Address</div> <div> <div>Street</div> <div>849 22nd St., Apt. #1</div> <div>City</div> <div>San Diego</div> <div>State/Territory</div> <div>California</div> <div>Zip</div> <div>92102</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	2604990951

Applicant Education

BA/BS From	Goshen College
Date of BA/BS	April 2013
JD/LLB From	Thomas Jefferson School of Law
	http://www.tjsl.edu
Date of JD/LLB	May 12, 2024
Class Rank	5%
Law Review/Journal	Yes
Journal(s)	Thomas Jefferson Law Review
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Schopler, Andrew
andrew_schopler@casd.uscourts.gov

Burns, Jack
JBurns@sheppardmullin.com
619-338-6588

Sherr, Karin
ksherr@tjssl.edu
(619) 961-4240

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Benjamin J. Kelly

kellybj@tjssl.edu · 260.499.0951

August 6, 2023

Chambers of the Hon. Kimberly Swank
United States Courthouse
201 S. Evans St.
Greenville, NC 27858

Re: Term Law Clerk: August 1, 2024-August 1, 2025

Dear Judge Swank:

I started as an extern in Judge Bumatay's chambers. Now, I'm seeking a clerkship in your chambers for the August 2024-2025 term, or for any term in the future.

Without any criminal-procedure experience, one of my first assignments in Judge Bumatay's chambers was to research and give a recommendation on the administrative search doctrine. After learning the entirety of the administrative search doctrine in less than two weeks, I turned in the assignment. The positive feedback I received on my work made me realize two things: (1) a judicial clerk's primary skill is the ability to master a huge, new area of law very rapidly and provide a professional and polished recommendation, and (2) I really, *really* liked doing it.

In addition to Judge Bumatay, I have been fortunate enough to work in-chambers for Judge Schopler at the District Court. During my time with Judge Schopler, he completed the nomination and confirmation process to become a district judge, leaving his magistrate judge role. This means that I've had the fortune to work for a circuit judge, a district judge, and a magistrate judge. These experiences have prepared me for the rigors and demands of a judicial clerkship.

For example, under Judge Schopler, I helped draft an order on a Rule 12(b)(1) motion and an order for default judgement, a report and recommendation for a habeas corpus petition, prepared notes for early neutral evaluations and settlement conferences, and reviewed a search warrant. For Judge Bumatay, I wrote two bench memos that were circulated to a three-judge panel, which ultimately agreed with my recommendation. And, I assisted Judge in writing a memorandum disposition. In short, I hope to leverage these experiences to allow for a smooth transition into your chambers in Greenville.

This application includes my resume, law school transcript, and a writing sample from my time in Judge Schopler's chambers. Recommendation letters from Judge Schopler, President Karin Sherr, the President of Thomas Jefferson School of Law, and Professor Jack Burns are included. Judge Bumatay has offered to be a reference on my behalf. I can provide his contact information upon request. Thank you for your time and consideration.

Respectfully,



Benjamin J. Kelly

Benjamin J. Kelly

kellybj@tjssl.edu · 260.499.0951

EDUCATION

Thomas Jefferson School of Law, San Diego, Calif.

Anticipated Juris Doctorate May 2024 | GPA: 3.84 | Class Rank: 3/81

- **CALI Awards:** Business Associations · Torts · Professional Responsibility · Legal Writing II.
- **Memberships:** Law Review · Student Bar Association · Baseball Arbitration Competition Team.

Goshen College, Goshen, Ind.

BA Broadcasting; Minor Spanish | GPA: 3.40

- Scholarship Baseball Player · Sports Director, WGCS-FM · Sports Reporter, *The Record Newspaper*.

LEGAL EXPERIENCE

Garcia Hong Law, A.P.C., San Diego, Calif.

Law Clerk | Summer 2023

- Civil litigation firm focused on Contract Issues, Business Torts, Professional Liability, among others.
- Responsibilities include drafting motions, conducting discovery and legal research, and court observations.

Hon. Andrew G. Schopler, U.S. District Court for the Southern District of California, San Diego, Calif.

Judicial Extern | Spring 2023

- Worked in-chambers while Judge Schopler was a Magistrate and a District Judge.
- Prepared Early Neutral Evaluation notes for Judge and the clerks for a variety of cases.
- Assisted in drafting two orders and one report and recommendation.

Hon. Patrick J. Bumatay, U.S. Court of Appeals, Ninth Circuit, San Diego, Calif.

Judicial Extern | Summer 2022

- Worked in-chambers daily assisting the clerks with legal research, citation checking, and substantive review of opinions and other memorandums.
- Wrote two bench memos, both circulated to the three-judge panel scheduled to hear oral arguments.
- Assisted Judge in disposition-writing analysis for those two cases.

PROFESSIONAL SPORTSCASTING EXPERIENCE

Northwest Arkansas Naturals, Double-A Affiliate, Kansas City Royals, Springdale, Ark.

Radio Voice & Baseball Operations Coordinator | 2014 – 2020

- Provided solo radio play-by-play for all 140 home & road Naturals games.
- Created and disseminated daily communications including press releases, game notes, rosters.
- Researched and published annual 150-page media guide with current biographies and statistics; sold in Team Store.
- Facilitated team travel schedule and expense reports in conjunction with the Royals; coordinated living arrangement for 25-30 players plus 4-6 coaches.

SEC Network Digital Platform, Fayetteville, Ark.

Play-by-Play Announcer | 2016 – 2020

- Broadcast Univ. of Arkansas soccer, volleyball, basketball, softball, and baseball on the SEC Network digital platform.

Razorback Sports Network, Fayetteville, Ark.

Radio Voice & Play-by-Play Announcer | 2018 – 2020

- Play-by-Play broadcaster for Razorback Baseball games carried on 25 affiliated stations across Arkansas.

SKILLS & ACTIVITIES

Languages: Conversational Spanish

Activities & Interest: Broadcaster · Running/Weight Lifting · Museums · Piano · Baseball · Maps

Volunteer Experience: Northwest Arkansas Miracle League Announcer (Little League for children with special needs).

Unofficial Transcript

Thomas Jefferson School of Law

Office of the Registrar

701 B Street Suite 110

San Diego, CA 92101

Name: Kelly, Benjamin J

Curriculum:

LAWS

Degree Awarded

No Degree Awarded Yet

Date Granted

Honors:

Cumulative GPA: 3.84

Previous Institution:

2021 Summer CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points		
CALS 105	Criminal Law	Online	2.6	3.00	7.80		
CALS 118	Introduction to Law	Online	CR	1.00	0.00		
CALS 213	Client Interview'g	Online	H	2.00	0.00		
	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	3.00	6.00	6.00	3.00	0.00	7.80	2.60
Overall	3.00	6.00	6.00	3.00	0.00	7.80	2.60

2021 Fall CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 099	Legal Writing I	Lecture	3.8	3.00	11.40
CALS 101	Contracts	Lecture	3.4	5.00	17.00
CALS 111	Torts	Lecture	4.2	5.00	21.00
CALS 119	Learning Skills	Lecture	CR	1.00	0.00

Awards

Dist. Honor Roll

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	13.00	14.00	14.00	13.00	0.00	49.40	3.80
Overall	16.00	20.00	20.00	16.00	0.00	57.20	3.58

2022 Spring CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 103	Civil Procedure	Lecture	4.0	5.00	20.00
CALS 140	Professional Respons	Lecture	4.3	3.00	12.90
CALS 171	Wills & Trusts	Lecture	3.1	3.00	9.30
CALS 199	Legal Writing II	Lecture	4.0	3.00	12.00

Awards

Dist. Honor Roll

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	14.00	14.00	14.00	14.00	0.00	54.20	3.87
Overall	30.00	34.00	34.00	30.00	0.00	111.40	3.71

2022 Spring Inter CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 682	Whistle Blower Law	Online	CR	1.00	0.00

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	0.00	1.00	1.00	0.00	0.00	0.00	0.00
Overall	30.00	35.00	35.00	30.00	0.00	111.40	3.71

2022 Summer CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 548	Intra School Moot Ct	Online	H	1.00	0.00
CALS 697	Externship I	Externship	CR	3.00	0.00

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	0.00	4.00	4.00	0.00	0.00	0.00	0.00
Overall	30.00	39.00	39.00	30.00	0.00	111.40	3.71

2022 Fall CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 106	Criminal Procedure	Lecture	4.0	3.00	12.00
CALS 115	Business Association	Lecture	4.3	3.00	12.90
CALS 135	Constitutional Law I	Lecture	3.9	3.00	11.70
CALS 145	Property Law	Lecture	4.1	5.00	20.50
CALS 418	Scholarly Legal Writ	Lecture	CR	1.00	0.00

Awards

Dist. Honor Roll

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	14.00	15.00	15.00	14.00	0.00	57.10	4.08
Overall	44.00	54.00	54.00	44.00	0.00	168.50	3.83

2023 Spring CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 136	Constitutional Lw II	Lecture	4.2	3.00	12.60
CALS 138	Evidence	Lecture	3.5	4.00	14.00
CALS 170	Trial Practice	Lecture	4.0	3.00	12.00
CALS 354	Law Review	Lecture	CR	1.00	0.00

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	10.00	11.00	11.00	10.00	0.00	38.60	3.86
Overall	54.00	65.00	65.00	54.00	0.00	207.10	3.84



United States District Court

Southern District of California
Schwartz Courthouse
221 West Broadway, Suite 5160
San Diego, California 92101

Andrew G. Schopler
U.S. District Judge

Phone: (619) 557-6480
Fax: (619) 702-9932

May 23, 2023

Re: Benjamin Kelly

To whom it may concern,

Benjamin is a workhorse. While serving in my chambers as a judicial extern, he tied for the most written projects drafted by any of my externs, before or since. This feat is all the more impressive because Benjamin worked for me only part-time during the school year, whereas many of my externs have worked full-time during the summer. What's more: Benjamin distinguished himself with his legal writing and analysis.

During his externship, which bridged my service as a Magistrate Judge and my appointment as a District Judge, Benjamin was assigned to work on about ten settlement conferences and motion hearings. In each case, the draft opinion or bench memo he prepared was well written and analytically sound. In fact, I agreed with each of his recommendations, and they formed the basis of my opinions and orders in those cases.

But Benjamin's virtues don't end with his impressive productivity and work product. He's also great to work with. Between his great baseball stories and his hunger to learn and improve, he was a daily morale boost for my whole chambers.

In short, you couldn't ask for a more dedicated and capable young attorney. I highly recommend Benjamin to any judge seeking a law clerk.

Very truly yours,

A handwritten signature in dark ink, appearing to read "AS", written over a horizontal line.

Andrew G. Schopler
United States District Judge

Jack Burns
501 West Broadway, 19th Floor
San Diego, CA 92101

August 06, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am a partner at Sheppard Mullin and a former adjunct torts professor at Thomas Jefferson School of Law. I write to support the clerkship application of Benjamin Kelly, who was *by far* my best student from my time as a professor. For several reasons, discussed in more detail below, I sincerely believe that Benjamin will excel as a law clerk.

First, I was consistently impressed by Benjamin's ability to grasp and articulate tough material. In fact, every time the class did not quite understand a case holding, or could not quite apply a concept, I would call on Benjamin. I knew that Benjamin would be fully prepared, that he would be able to make the connections others could not, and that he could articulate complex legal issues in a way that others in the class would understand. Time after time, Benjamin proved me right.

Second, my interactions with Benjamin inside and outside of the classroom thoroughly convinced me that he is an intellectually curious student that takes his legal career seriously. Benjamin regularly asked extremely thoughtful questions—often based on case holdings buried in our textbook's footnotes—demonstrating that he was putting in extraordinary work to understand the ways that concepts might apply differently in different scenarios.

Third, Benjamin's performance on my closed book essay exam was nothing short of amazing. Without the benefit of his notes, Benjamin correctly cited and discussed case holdings relevant to the questions at hand. Benjamin provided deep analysis of each pertinent issue, accurately analogizing and distinguishing cases we covered during the semester. Benjamin seemingly memorized the holding of nearly every case from our readings. No other exam came close. Benjamin's overall grade point average of 3.84 likewise reflects his strong academic ability. Indeed, this is particularly impressive in light of the stringent 2.4 average curve at the school, which is far below the curve at any school I am familiar with.

Fourth, Benjamin's essay exam also demonstrated that he is an excellent writer. Similar to his use of plain language to break down complex issues during class discussion, Benjamin's essay used plain words, avoided unnecessary verbiage, and had an easy-to-read structure. Benjamin's exam was enjoyable to read. Not surprisingly to me after reading Benjamin's essay in my class, Benjamin also received top grades in his legal writing classes.

Finally, as Benjamin's resume suggests, he is not only bright, but socially conscious. Before law school, Benjamin worked as a television and radio broadcaster (a position that no doubt aided his ability to prepare for class, and articulate issues in a plain and understandable way). Impressive to me, Benjamin used his talents as a broadcaster for good, volunteering as an announcer for a baseball little league for children and teens with special needs. This suggests that Benjamin has not only the brains to be a great lawyer but also the heart to be a great servant.

As a former law clerk for two federal judges, I know from experience that clerkship applications are carefully vetted, and that there are many impressive candidates for the positions. I suggest to you, respectfully, that Benjamin belongs in the elite group. I recommend him. If you have any questions or would like to discuss Benjamin's application further, please contact me any time at (619) 338-6588 or at jburns@sheppardmullin.com.

Very sincerely and respectfully,

Jack Burns

Jack Burns - JBurns@sheppardmullin.com - 619-338-6588



June 2, 2023

To Whom It May Concern,

I am writing in support of applicant, Benjamin Kelly. It is not often that a student seeks a letter of recommendation from the President of the Law School, but I am uniquely familiar with Benjamin and his ambitions. Benjamin, unlike other students, has made the time to meet with me to discuss his career aspirations. He shared with me his passion for justice and sought my advice on how best to serve his community. I shared with him that the single most influential part of my legal career was getting a judicial clerkship. I expect this conversation to have at least, in part, fueled Benjamin's desire to attain this position.

I have worked with Benjamin over the last two years in his role with the Student Bar Association and particularly as the SBA Parliamentarian. I believe Benjamin will make a strong contribution to the Court as I have seen him many times approach problems with an open mind, exercise fairness and impartiality in administering our school policies, and critically, and often creatively, finding a reasoned solution. Benjamin has spent his time in law school thus far not only excelling in the classroom, but intentionally building a network of peers, gaining real world experience, and engaging in academic course work that allowed him to understand who he wants to be as a professional. I appreciate Benjamin's willingness to self-reflect and make intentional decisions to work toward his future.

He is always motivated to be his best self and can normally be found with a smile on his face. He has a passion for the law as exhibited by his dedication to several student organizations, and a commitment to justice extending beyond his on-campus activities.

Benjamin's ability to engage with others make him the consummate teammate and I know that will serve him well in any chambers. I believe strongly that he'll make an excellent member of the legal community and is prepared academically to make significant contributions when asked. I am proud of Benjamin for making the most of his law school experience in a multitude of ways and even more excited that he wants to continue his journey in pursuit of this clerkship.

If you have further questions about Benjamin or his qualifications, I can be reached at ksherr@tjsl.edu.

Karin K. Sherr
Sincerely,

Karin K. Sherr
President & General Counsel
Thomas Jefferson School of Law

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

INNSIGHT.COM INC.,
Plaintiff,

v.

MYERES.COM RESERVATIONS INC.,
Defendant.

Case No.: 22-cv-0360-AGS-DEB

**ORDER GRANTING IN PART
MOTION FOR DEFAULT
JUDGMENT (ECF 17)**

The Clerk entered default against defendant. Plaintiff now moves to reduce that default entry to a judgment based on defendant's willful copyright infringement. For the reasons below, the Court grants in part plaintiff's motion.

BACKGROUND

Plaintiff INN sight.com owns a registered copyright, titled "ADA Accessibility Features & Amenities Page." (ECF 17-3, at 11.) Hotels must provide accessibility information about their amenities and features to allow customers to determine whether a given hotel meets that customer's needs. *See Love v. Marriott Hotel Servs.*, 40 F.4th 1043, 1047 (9th Cir. 2022); *see also* 28 C.F.R. § 36.302(e)(1)(ii). INN sight's accessibility page is designed to facilitate ADA compliance in a simple, comprehensive manner. (ECF 17-1, at 1.) INN sight claims that defendant Myeres.com Reservations Inc. copied "nearly verbatim" INN sight's accessibility page, and thus willfully infringed on its copyright. (ECF 17-1, at 1.)

After INN sight sued, Myeres's owner, proceeding pro se, responded and demanded a change of venue. (ECF 17-1, at 2.) INN sight moved to strike because entity parties like Myeres are required to appear through counsel. (ECF 8-1, at 2.) After a hearing, the Court struck the purported answer and ordered Myeres to retain an attorney, file a notice of appearance, and answer or file another appropriate responsive pleading. (ECF 17-1, at 2.) Myeres did none of this. (*Id.*) As a result, the Clerk entered default against Myeres on January 19, 2023. (*Id.*)

INNstight now seeks a default judgment, requesting \$30,000 in damages for willful infringement, \$798.97 in costs, and \$5,040.00 in attorneys' fees. (*Id.*) Notice of this motion was served personally and through the Florida Secretary of State. (*Id.* at 1.) Myeres did not respond. (*Id.*)

DISCUSSION

A. Default Judgment

The court has discretion to grant a default judgment against a defendant who fails to defend a claim. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980); Fed. R. Civ. P. 55(b)(2). The court’s discretion is guided by several factors: (1) the merits of plaintiff’s substantive claims, (2) the sufficiency of the complaint, (3) the possibility of prejudice to plaintiff, (4) the sum of money at stake, (5) the possibility of a dispute concerning the material facts, (6) if excusable neglect caused the defendant’s default, and (7) the public policy favoring decisions on the merits. *Kenna v. Liveauctioneers, Inc.*, No. CV 21-5862-RSWL-AGRX, 2022 WL 16973241, at *1–2 (C.D. Cal. Nov. 15, 2022) (citing *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986)). At this stage, well-pled allegations in the complaint regarding liability are taken as true, while allegations concerning damage amounts must still be proven. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002).

1. Merits of the Claims and Sufficiency of the Complaint

The complaint asserts two causes of action: direct copyright infringement and contributory infringement. (ECF 1, at 4–7.) INNsght’s allegations establish liability for direct infringement, so the Court need not consider the contributory-infringement claim.

Direct infringement requires copyright ownership and the copying of protected work. *See Skidmore as Trustee for Randy Craig Wolf Trust v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020). INNsight produced a “Certificate of Registration” effective May 30, 2019, titled “ADA Accessibility Features & Amenities Page.” (ECF 17-3, at 11.) A certificate of registration is prima facie evidence of valid copyright ownership. *DFSB*

1 *Kolleeive Co. v. Yew*, No. CV-11-01065 WHA, 2011 WL 13250793, at *1–2 (N.D. Cal.
2 Sept. 15, 2011).

3 INN sight asserts that Myeres willfully infringed upon its copyright. (ECF 1, at 4.)
4 In this context, the term “willfully” means that defendant acted “with knowledge that the
5 defendant’s conduct constitutes copyright infringement.” *DisputeSuite.com, LLC v. Credit*
6 *Umbrella Inc.*, No. CV146340MWFMANX, 2016 WL 6662722, at *6 (C.D. Cal. Apr. 25,
7 2016). INN sight states that (1) Defendant created the San Diego hotel’s page after the
8 registration of the copyright (ECF 1, at 4) and that (2) Myeres copied Plaintiff’s
9 Accessibility Page “nearly verbatim” in creating the San Diego hotel’s website (ECF 17-1,
10 at 2). In fact, the language, style, and order of material on Myeres’s conformance page is
11 virtually identical to that of INN sight’s copyrighted ADA Accessibility page, except for
12 minor differences—like the hotel’s location and name—as well as the omission of a few
13 amenities. (See ECF 17-3, at 4–9, 14–16.)

14 Based on the similarities of the text and websites, plaintiff has sufficiently
15 demonstrated infringement and willfulness. See *DisputeSuite.com, LLC*, 2016 WL
16 6662722, at *6 (finding willful infringement when defendant “clone[d]” significant
17 portions of plaintiff’s website “verbatim” and refused to participate in the litigation). Thus,
18 this factor weighs in favor of default judgment.

19 **2. Prejudice to the Plaintiff**

20 A plaintiff suffers prejudice if default judgment is denied, because the plaintiff then
21 has no other recourse for recovery. See *Philip Morris USA Inc. v. Castworld Prods., Inc.*,
22 219 F.R.D. 494, 499 (C.D. Cal. 2003). Even though this case has been pending for over a
23 year, Myeres has not made any but the most cursory and improper attempts to defend the
24 case, in the process ignoring a direct court order. (See ECF 12.) INN sight will be prejudiced
25 if the motion is denied because INN sight would be left without a remedy.

26 **3. Amount at Stake**

27 A substantial amount at stake disfavors default judgment. See *DFSB Kolleeive Co.*,
28 *Ltd. v. Yew*, No. 11-cv-01065-WHA, 2011 WL 13250793, at *1, *3 (N.D. Cal. Sept. 15,

2011). Yet, when the money at stake is tailored to defendant’s specific misconduct, default judgment may still be appropriate. *Bd. of Trs. v. Core Concrete Constr., Inc.*, No. 11-cv-02532-LB, 2012 U.S. Dist. LEXIS 14139, at *10 (N.D. Cal. Jan. 17, 2012). To determine if the amount of money is specifically tailored to the misconduct, courts consider the expenses saved and profits reaped by the defendant in connection with the infringement, the plaintiff’s lost revenues, and the willfulness of the infringement. *Texkhan, Inc. v. Windsor Fashions, Inc.*, No. 18-CV-3794-GW, 2018 U.S. Dist. LEXIS 225194, at *12 (C.D. Cal. Oct. 1, 2018).

INN sight asserts here that Myeres “willfully” violated its copyright but requests the maximum penalty of \$30,000 for unintentional copyright infringement. (ECF 17.) Moreover, INN sight acknowledges that because Myeres failed to participate in the proceedings, it cannot determine the profits that Myeres reaped and expenses saved (ECF 17-1, at 6.) According to INN sight, its licensing fees, which include the ADA accessibility page, amount to an annual rate of \$8,400. (*Id.*) Based on that number, INN sight contends that slightly more than triple the licensing fee amount is within the range of damages in copyright cases. (*Id.*)

Courts have held that three times the cost of a licensing fee is sufficient to repair injury and deter future wrongdoing. *See Wareka v. Faces*, 20-CV-62466-WILLIAMS/VALLE, 2021 U.S. Dist. LEXIS 201546, at *7 (S.D. Fla. Oct. 19, 2021) (holding that three times the value of what defendant would have paid is a modest award); *Int’l Korwin Corp. v. Kowalczyk*, 855 F.2d 375, 383 (7th Cir. 1988) (affirming an award of three times the amount of a properly purchased license).

Thus, the Court concludes that the requested amount is appropriate and not so substantial as to weigh against default judgment.

4. Dispute of Material Facts

At this point, the Court does not see a possibility for a dispute over the material facts. Even Myeres’s aborted attempt at a pro se defense, stricken by the Court, rested in large part on the argument that the information on the infringing accessibility page was publicly

1 available. (See ECF 12-1.) But a copyright doesn't necessarily protect *information*; it
 2 protects the way that information is communicated. See *L.A. News Serv. v. Tullo*, 973 F.2d
 3 791, 795 (9th Cir. 1992). The claim here is about copying verbatim the entirety of the
 4 layout, format, and presentation style of INN'sight's accessibility page. On that front, there
 5 appears to be little dispute.

6 **5. Excusable Neglect**

7 In contemplating the possibility that Myeres's default was the result of excusable
 8 neglect, the Court considers whether defendant was provided adequate notice as well as
 9 the circumstances surrounding defendant's failure to answer the complaint. See *Doggie*
 10 *Dental, Inc. v. Shahid*, No. 4:19-CV-01705-KAW, 2021 WL 4582112, at *6 (N.D. Cal.
 11 June 17, 2021). Myeres's default was not due to excusable neglect, because it (1) had
 12 proper notice of the complaint, (2) did not comply with the judicial orders, and (3) failed
 13 to respond or appear at all. (ECF 17-1, at 4.) Myeres's decision not to appear through
 14 counsel and then to ignore this Court's order cannot be deemed excusable neglect. See
 15 *Shanghai Automation Instrument Co. v. Kuei*, 194 F. Supp. 2d 995, 1005 (N.D. Cal. 2001)
 16 (finding no excusable neglect when defendants were properly served with the complaint,
 17 notice of entry of default, and supporting papers).

18 **6. Public Policy**

19 Finally, the public-policy prong favors decisions on the merits and weighs against a
 20 default judgment. See *Hunter v. TBDC, LLC*, No. C-08-4158, 2009 U.S. Dist. LEXIS 8943,
 21 2009 WL 224958, at *3 (N.D. Cal. Jan. 29, 2009) (citing *Pena v. Seguros La Comercial*,
 22 *S.A.*, 770 F.2d 811, 814 (9th Cir.1985)). This factor also weighs against a default judgment
 23 here, but only somewhat, given Myeres's election not to participate in the litigation and its
 24 violation of clear court orders. The Court also has public-policy concerns about rewarding
 25 Myeres's improper conduct in this litigation.

26 In sum, the discretionary factors as a whole weigh strongly in favor of a default
 27 judgment, and only the public-policy factor weighs (somewhat) against it. The Court
 28 concludes that a default judgment is proper.

B. Damages

1. Statutory Damages

As mentioned above, the amount at stake is moderate and within the court's discretion to award appropriate damages. For statutory damages, courts often take the licensing fee plaintiff would have charged and then triple it, to put defendants "on notice that it costs less to obey the copyright laws than to violate them." *Sailor Music v. IML Corp.*, 867 F. Supp. 565, 570 n.8 (E.D. Mich. 1994). The Court has no evidence of Myeres's profits or expenses, as it did not participate. The Court will therefore use INN sight's annual \$8,400 licensing fee as a benchmark. (ECF 17.) Applying treble damages, this Court finds that the appropriate damages award is \$25,200.

2. Attorneys' Fees and Costs

Under the Copyright Act, "attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion." *Microsoft Corp. v. Nop*, 549 F. Supp. 2d 1233, 1239 (E.D. Cal. 2008) (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)). INN sight claims \$5,040.00 in attorney fees. (ECF 17-1, at 8.) As set out above, INN sight has sufficiently pleaded that Myeres's actions were "willful," and thus the Court concludes that attorney fees should be awarded. *See Microsoft*, 549 F. Supp. 2d at 1239 (holding that "defendant's acts of infringement were willful" and thus "an award of attorneys' fees and costs is warranted"). INN sight stated that its attorney's rate is \$300 per hour for 16.8 hours of work. (ECF 17-1, at 8.) INN sight's counsel provided descriptions of the work, the time it took to perform, and rates from prior cases. (ECF 17-2, at 2, 5-6.) Given the San Diego market, that is a reasonable attorney's rate, and the number of hours is similarly appropriate. *See Ha Nguyen v. MWS of N. Am., LLC*, No. 3:20-CV-2432 JLS (BLM), 2023 U.S. Dist. LEXIS 6319, at *10 (S.D. Cal. Jan. 12, 2023) (finding a \$300 hourly rate reasonable); *WB Music Corp. v. Limericks Tavern, Inc.*, No. 220CV02086ODWMAAX, 2021 WL 40255, at *6 (C.D. Cal. Jan. 5, 2021) (concluding "16.5 hours" spent on a similar defaulted copyright case was "reasonable"). So, the Court finds INN sight's attorney's fees reasonable.

INNstight also claims \$798.97 in costs: \$402 in court filing fees and the remainder in service charges. (*See* ECF 17-2, at 7.) Court filing fees and service costs are “standard expenses incurred in prosecuting a civil lawsuit of this kind, and are the type of expenses typically billed by attorneys to paying clients in the marketplace.” *In re Packaged Seafood Prod. Antitrust Litig.*, No. 15-MD-2670 DMS (MDD), 2022 WL 3588414, at *3 (S.D. Cal. Aug. 19, 2022). These fees and costs are therefore warranted, reasonable, and should be included in the default judgment.

CONCLUSION

Plaintiff's motion for default judgment (ECF 17) is **GRANTED IN PART**. The Clerk is directed to enter judgment in favor of plaintiff and against defendant for \$31,038.97, consisting of \$25,200 in damages, \$5,040.00 in attorney's fees, and \$798.97 in costs and fees.

Dated: May 1, 2023

ASp

Andrew G. Schopler
United States District Judge

Applicant Details

First Name **Alexander**
 Last Name **MacLennan**
 Citizenship Status **U. S. Citizen**
 Email Address alex.maclennan@berkeley.edu
 Address

Address
Street
1833 Spruce St
City
Berkeley
State/Territory
California
Zip
94709
Country
United States

Contact Phone Number **5135359166**

Applicant Education

BA/BS From **University of Cincinnati**
 Date of BA/BS **April 2018**
 JD/LLB From **University of California, Berkeley**
School of Law
<https://www.law.berkeley.edu/careers/>
 Date of JD/LLB **May 10, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Berkeley Journal of International Law**
Berkeley Journal of Criminal Law
 Moot Court Experience **Yes**
 Moot Court Name(s) **McBaine Honors Moot Court**
Competition

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships **No**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Tomlins, Christopher
ctomlins@law.berkeley.edu
Grillo, Evelio
egrillo@alameda.courts.ca.gov
Chemerinsky, Erwin
echemerinsky@berkeley.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ALEX MACLENNAN

5706 Chestnut Ridge Dr, Cincinnati, OH, 45230 • alex.maclennan@berkeley.edu • 513-535-9166

Alex MacLennan
5706 Chestnut Ridge Drive
Cincinnati, OH 45230

August 6, 2023

The Honorable Kimberly A. Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank,

I am a rising third-year student at the University of California, Berkeley, School of Law with a top 15% 2L academic distinction and am an Editor-in-Chief of the *Berkeley Journal of Criminal Law*. I am writing to apply for a 2024-25 clerkship in your chambers.

Enclosed please find my resume, law school transcripts, and writing sample. The writing sample is from my Law & History Foundation Seminar paper, which examines the history of the Third Amendment and its modern application. A second writing sample from my moot court brief where I made it to the semi-finals of the competition and accepted a moot court competition student director position for 2023-24 is available upon request. Letters of recommendation from the following three recommenders are also included.

Dean Erwin Chemerinsky

Dean & Jesse H. Choper Distinguished Professor of Law
echemerinsky@law.berkeley.edu

Judge Evelio Grillo

Lecturer at the University of California, Berkeley, School of Law
egrillo@alameda.courts.ca.gov

Professor Christopher Tomlins

Elizabeth Josselyn Boalt Professor of Law
ctomlins@law.berkeley.edu

If there is any other information that may be helpful to you, please let me know.
Thank you for your consideration.

Very truly yours,

Alex MacLennan

ALEX MACLENNAN

5706 Chestnut Ridge Dr, Cincinnati, OH, 45230 • alex.maclennan@berkeley.edu • 513-535-9166

EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA

Juris Doctor Candidate, Expected Graduation May 2024

Honors: Second-Year Academic Distinction (Top 15%)

Awards: Jurisprudence Award (highest grade) in Evidence (Fall 2022)

Activities: *Berkeley Journal of Criminal Law* (2023-24 Editor-in-Chief)
Berkeley Journal of International Law, American Constitution Society
 McBaine Moot Court Competition (2022-23 Semi-Finalist, 2023-24 Student Director)

Publications: *Berkeley Journal of Criminal Law* Blog
Adultery Laws: 19th Cheat Code for the 21st Century?
R v Brown: Constitutional Questions Answered, Normative Ones Raised
Berkeley Journal of International Law Blog (Travaux)
Animals vs. Walls: The Effects of Border Barriers on Animal Populations
The Commonwealth Without Queen Elizabeth II: Is the Sun Setting on the Monarchy's Overseas Role?

The Ohio State University Moritz College of Law, Columbus, OH

Completed First-Year Juris Doctor Curriculum, Aug. 2021 – May 2022; Rank: 8/175, GPA: 3.9

Awards: Invited to join *Ohio State Law Journal* on the basis of academic achievement
 CALI Excellence for the Future Award® (highest grade) in Contracts I (Spring 2022)
 Dean's Scholar Award; Eminent Scholarship

Activities: 1L Moot Court Competition; Professional & Graduate School Trivia, American Constitution Society

Study-abroad: University of Oxford Summer Law Program, Oxford, UK, Summer 2022

University of Cincinnati, Cincinnati, OH

Bachelor of Science in Industrial Design, Apr. 2018

Awards: Cincinnati Scholarship

Worked 5-15 hours per week throughout year to fund education

EXPERIENCE

Frost Brown Todd LLP, Cincinnati, OH

May 2023 – July 2023

Summer Associate, Litigation and Appellate Focused

Seeking Alpha, Remote Work

Freelance Financial Commentary Writer

Oct. 2015 – Apr. 2021

Wrote financial and investment articles for online publication. Articles analyzed companies, economic issues, and investment ideas with a focus on stocks, preferred stocks, and bonds.

Thyssenkrupp Bilstein, Hamilton, OH

Product Designer

Jan. 2017 – Apr. 2017, Aug. 2017 – Dec. 2017

Led the company's first aesthetic design team in Hamilton, OH. Collaborated with engineering, marketing, and management in Ohio, California, and Germany. Presented new products, building redesign ideas, and marketing strategy.

U.S. Senate, Office of Senator Sherrod Brown (Ohio), Cincinnati, OH

Intern

Sep. 2012 – Mar. 2013

Responded to constituent questions and concerns and conducted research about policies.

ADDITIONAL INFORMATION

Certificates: Financial Programming and Policies, Part 1: Macroeconomic Accounts & Analysis (edX – International Monetary Fund), La Terre comme système: une approche géographique (edX – Sorbonne Université)

Interests: History, trivia, travel (domestic and international), economics and finance, vintage coats, trying new foods

Favorite Law-Themed TV Shows: *Law & Order*, *Ally McBeal*, *Better Call Saul*

Berkeley Law

University of California

Office of the Registrar

Alexander MacLennan
Student ID: 3038690332
Admit Term: 2022 Fall

Printed: 2023-06-10 16:30
Page 1 of 2

Academic Program History			2023 Spring		
Major: Law (JD)			<u>Course</u>	<u>Description</u>	<u>Units</u> <u>Law Units</u> <u>Grade</u>
			LAW 210	Legal Profession	2.0 2.0 H
				Fulfills Professional Responsibility Requirement	
				Andrew Dilworth	
			LAW 220.9	First Amendment	3.0 3.0 H
				Kenneth Bamberger	
			LAW 230.9	Where Civil & Crim Law Collide	1.0 1.0 CR
				Jed Rakoff	
			LAW 231.1	Crim Procedure- Adjudication	4.0 4.0 HH
				Hadar Aviram	
			LAW 242.9	Listening and Communicating	1.0 1.0 CR
				Units Count Toward Experiential Requirement	
				George Higgins	
			LAW 245.2	Civil Trial Practice	3.0 3.0 P
				Units Count Toward Experiential Requirement	
				Winifred Smith	
				Evelio Grillo	
			LAW 295.3J	McBaine Moot Court Competition	2.0 2.0 CR
				Units Count Toward Experiential Requirement	
				Gregory Washington	
				<u>Units</u> <u>Law Units</u>	
				Term Totals	16.0 16.0
				Cumulative Totals	60.0 60.0

2022 Fall			<u>Units</u>	<u>Law Units</u>	<u>Grade</u>
<u>Course</u>	<u>Description</u>				
LAW 231	Crim Procedure- Investigations	4.0	4.0	H	
	Erwin Chemerinsky				
LAW 241	Evidence	4.0	4.0	HH	
	Jonah Gelbach				
LAW 251.52	Economics of Corp & Secur Lit.	1.0	1.0	CR	
	Matthew Cain				
LAW 251.72	Storytelling for Corporate Law	1.0	1.0	CR	
	Units Count Toward Experiential Requirement				
	Aaron Zamost				
LAW 262.81	Anticorruption Compliance	1.0	1.0	CR	
	Hana Ivanhoe				
LAW 267.4	Law, Hist Found Sem	3.0	3.0	HH	
	Fulfills Writing Requirement				
	Christopher Tomlins				

<u>Transfer Credits</u>	<u>Units</u>	<u>Law Units</u>
Ohio State Univ College of Law	27.0	27.0
Ohio State Univ College of Law.	3.0	3.0
Units Count Toward Experiential Requirement		

	<u>Units</u>	<u>Law Units</u>
Term Totals	44.0	44.0
Cumulative Totals	44.0	44.0



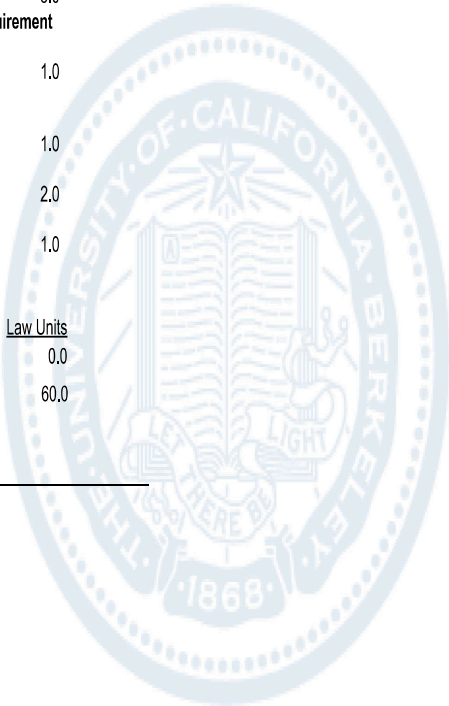
 Carol Rachwald, Registrar

Berkeley Law
University of California
Office of the Registrar

Alexander MacLennan
Student ID: 3038690332
Admit Term: 2022 Fall

Printed: 2023-06-10 16:30
Page 2 of 2

		2023 Fall			
Course		Description	Units	Law Units	Grade
LAW	220.43	Constitutional Interpretation John Yoo Steven Hayward	1.0	1.0	
LAW	222	Federal Courts Janice Brown	3.0	3.0	
LAW	245.23	William Fletcher Evidence Adv and Trial Obj	1.0	1.0	
LAW	246.1	Units Count Toward Experiential Requirement Criminal Trial Practice Units Count Toward Experiential Requirement Charles Denton	3.0	3.0	
LAW	251.12	Adv Topics Delaware Corp Law Steven Solomon	1.0	1.0	
LAW	261.73	Self Determ. Ppl in Intern Law Asa Solway	1.0	1.0	
LAW	277.1	Trade Secret Law David Almeling	2.0	2.0	
LAW	285.33	How to Think and Write Like a Judge	1.0	1.0	
			<u>Units</u>	<u>Law Units</u>	
Term Totals			0.0	0.0	
Cumulative Totals			60.0	60.0	




Carol Rachwald, Registrar

**University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278**

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	-	High Honors	CR	-	Credit
H	-	Honors	NP	-	Not Pass
P	-	Pass	I	-	Incomplete
PC	-	Pass Conditional or Substandard Pass (1997-98 to present)	IP	-	In Progress
NC	-	No Credit	NR	-	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: <https://www.law.berkeley.edu/careers/for-employers/grading-policy/>

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August 06, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

Alex MacLennan (Alex) has applied for a judicial clerkship in your chambers and has asked me to write in support of his application. I do so with pleasure. I have great respect for Alex's intellect, his maturity, his demonstrated capacity for very hard work, his ability to engage constructively with all manner of legal and intellectual questions, and his general demeanor. Alex is extremely intelligent, capable, reliable, and self-sufficient. He will not wait passively to be told what to do but will rather take the initiative and launch into activity. He appreciates advice and direction but is not afraid of responsibility. I believe he is well fitted to take on the exacting position of a judicial clerk in your chambers.

Alex MacLennan is a 2018 graduate (B.Sc.) of the University of Cincinnati, where he earned a degree in Industrial Design, and was a Cincinnati Scholar. Alex began his J.D. studies at the Ohio State University Moritz College of Law in the fall of 2021. He was a standout 1L student, ranking eighth in his class, with a near perfect GPA, winning particular recognition in Contracts. He transferred to Berkeley Law in fall semester 2022 and has continued to perform at a very high level, winning the Jurisprudence award (first in class) in Evidence, and several HH course grades – the highest grade we give.

I became acquainted with Alex in the fall of 2022, when he took my seminar in American Legal History. My seminar occupies a dual role in the Berkeley Law curriculum. It is open to J.D. students, but its primary function is to be a "foundation" seminar in the Law School's Ph.D. program in Jurisprudence & Social Policy (JSP). As such, it is taught as a graduate school reading and discussion seminar. Concretely we read and discuss a book each week, averaging 250-300 pages. Students are required to provide a short and informal written analysis of each week's book, as well as several formal "reaction" papers of c. 1500 words apiece. Finally, they write a substantial final research paper (10,000 words). Alex was one of a dozen students in the class – an energetic mix of J.D. students, JSP graduate students, and History Department graduate enrollees. In a class full of very accomplished people, Alex wrote extremely thoughtful reaction papers (both formal and informal), made important contributions to class discussion, and turned in an excellent final paper, which had required very extensive research. His writing is both fluent and forceful. (I take excellence in writing very seriously and "edit" student work obsessively, as I do my own. Alex's writing required little of this attention.) His performance earned him an HH grade.

Alex's paper was entitled "No Quarter For Tyranny! A Third Amendment for the Twenty-First Century." His goal was to take one of least known, most historically specific, elements of the United States Constitution, and explore its significance and applicability to present day America. Notwithstanding its legal obscurity, Alex argued, the Third Amendment had been granted a future by the very tendency of constitutional law jurisprudence to emphasize historical originalism in searching for constitutional meaning, and by its willingness to reconsider long-standing precedent. No less important, given the replication of Third Amendment language in many state constitutions, is the tendency for state courts to take a more pronounced role in constitutional litigation.

Alex's paper faithfully charted the pre-history of the amendment in English law, in the American Revolution, and the reasons for its inclusion in the Bill of Rights. His real accomplishment, however, was to show the breadth of meaning of the "quartering" declared abhorrent in the late eighteenth century, and the breadth of use of "troops" at that same time. Together, these contemporary meanings registered deep grievance with the presence of militarized force among, and its use to control, the general populace. These eighteenth-century meanings convey real constitutional protection against much of the activity that we would today associate with militarized expressions of policing. As well, Alex showed how the Third Amendment was intended to erect wide protections around a right to privacy distinct from and in addition to the Fifth Amendment's protection of ordinary property rights. As Joseph Story put it, the Third Amendment guaranteed "that a man's house shall be his own castle, privileged against all civil and military intrusion." What, Alex asks, is the current definition of "house," and of "intrusion"? What, indeed, is the significance of protections against compulsory "quartering" in a world in which governments seek to compel pregnancy? These are just a few of the issues that his paper canvasses as potential Third Amendment applications.

I was delighted by Alex's final paper, from which I learned a great deal. Simultaneously, I was greatly impressed by the research effort involved. The paper is very comprehensive, and very well written. It is highly imaginative, perhaps as such a paper necessarily must be, given that its purpose is to drag a seldom-discussed legal 'oddity' into the daylight of serious contemplation. It is written with a touch of humor, for the same reason, but only a touch. In our discussions of successive drafts Alex noted that he had first been attracted to the idea of a paper on the Third Amendment by its very quirkiness. My one substantive impact on the paper was to impress on Alex the importance of quickly leaving that quirkiness behind. One does not undertake serious research for laughs.

Alex's engagements in legal scholarship have extended far beyond the Third Amendment. I have mentioned his record of excellence as a student in Contracts and in Evidence. At Ohio State he participated in the 1L Moot Court competition. At Berkeley he has been deeply involved with the Berkeley Journal of International Law, and with the Berkeley Journal of Criminal Law, for which he will be Editor-in-Chief in the 2023-24 academic year. In summer 2022 he studied abroad in the University of Oxford Summer Law Program. Alex now aspires to bring that range of engagements to the work of a judicial clerk. He has already shown himself deeply committed to what clerking requires – engagement with complex issues of law as they are argued, evaluated, and decided at the various levels of our court system. His credentials are excellent, confirmed in his academic record.

Christopher Tomlins - ctomlins@law.berkeley.edu

There are many reasons why law students wish to become judicial clerks. Some do so to advance a career in practice, some because they hope, eventually, to become judges themselves, some because clerking remains a qualification of fundamental importance if one wishes to pursue an academic career in law teaching. As I see it, Alex imagines himself as a practitioner, but his application for a clerkship arises principally from his desire to experience the practice of law at the point of decision, to understand law from the unique perspective of chambers, unavailable to the practitioner who has never clerked. There is real curiosity behind the desire to find out what law is like in that moment of decision. He writes, "I have yet to find an area of law that I do not find interesting ... I don't know what type of law I want to practice but a clerkship would give me more opportunities feed the same sort of curiosity that led to me to law to begin with." Here is the wish to engage with law that Alex's personal statement on applying to transfer to Berkeley Law speaks of as with him from a very young age – a deep curiosity about how law works, about why it can seem at times internally inconsistent and yet remain overall authoritative and legitimate. A clerk in chambers, it seems to me, is in a position to be able to learn much about this side of law.

Alex MacLennan is an impressive young man. He has a vocation in law – he has found in law the answer to the intellectual curiosity that drives him onward as well as the means to support himself. He writes, without pretension or guile, "I have read a lot of economics, politics, and history but never saw a career path forward in any of those. I'm not good enough at math to be an economist, not charismatic enough to be a politician, and I didn't see a path where I could earn a reasonable living from history alone. But law has elements of each of these areas without the same downsides so going to law school was a natural move for me." This is frank honesty; it is pragmatism. It is the voice of someone who worked throughout the year, every year, to support himself whilst an undergraduate at the University of Cincinnati.

My own personal interactions with Alex have always been entirely positive. He is a decent person, who will work productively with a range of peers from very different backgrounds and with different life experiences. He is polite and professional in demeanor, and takes his responsibilities seriously. He is fundamentally good-humored, happy to listen to what others have to say before advancing his own observations and conclusions. In one-on-one interactions he is open, and lively – someone with whom it is a pleasure to interact.

I believe Alex MacLennan will add great value and bring great commitment to your chambers. I commend his candidacy to you, without reservation.

Sincerely

Christopher Tomlins

Elizabeth Josselyn Boalt Professor of Law (Jurisprudence & Social Policy), University of California Berkeley; and Affiliated Research Professor, American Bar Foundation, Chicago.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA



SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CHAMBERS OF
EVELIO GRILLO
Judge
Department 21

June 5, 2023

CHAMBERS OF
EVELIO M. GRILLO
JUDGE
County Administration Building
1221 Oak Street
Oakland, CA 94612

To Whom it May Concern:

I write to recommend Alex MacLennan for a judicial clerkship in the trial or appellate courts of the federal and state courts. Alex is a student in my civil trial practice class at Berkeley Law. The civil trial practice class combines the teaching of practical trial skills and academic study in a clinical setting. The civil trial practice class has two components, case study and demonstrative practical skills. The case study component involves integrating academic coursework with case file materials in preparation for the practical component of the class. The practical component of the class involves the students preparing and demonstrating opening and closing statements and conducting of direct and cross-examination exercises in class before their peers. The curriculum is also designed to impart a working knowledge of the Federal Rules of Evidence as well as specific trial practice skills such as impeachment, jury selection and oral argument.

Alex is an exemplary student who is dedicated to the study of law and to his academics. I have found Alex to be a hardworking and insightful student who makes a positive contribution to the class. The quality of Alex's work is uniformly high and without question, creative and insightful. I am aware that while at Berkeley Law, Alex has participated in two journals of note and published blog articles in the *Berkeley Journal of International Law* and the *Berkeley Journal of Criminal Law*, as well a competing in the McBaine Honors Moot Court Competition, which also speaks to his commitment as a law student, and to the legal profession.

Please give Alex MacLennan strong consideration in your clerkship selection process.

Sincerely,


Evelio M. Grillo

May 20, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am writing to highly recommend Mr. Alex MacLennan for a position as your law clerk. Mr. MacLennan was a student in my Criminal Procedure: Investigations class and received an honors grade. Indeed, Mr. MacLennan has received superb grades throughout law school. He completed his first year of law school at Ohio State and his grades were stunning, placing him in the top five percent of his class. He transferred to Berkeley Law and every grade so far has been honors or high honors.

Mr. MacLennan was a very frequent participant in class discussions. His questions often asked things that I had never considered and reflected an extraordinary intellectual curiosity and depth of analysis. His comments were always incisive, on point, and original. They always advanced the discussion and often caused me to think about the material in a new way.

His grades and his class participation demonstrate exceptional intelligence, consistent hard work, and impressive original thinking. I have no doubt that he would do a great job as your law clerk. He is very conscientious, and he writes well. He enjoys talking about ideas and would be a wonderful addition to any chambers. He is always warm and kind and I know that he would be a pleasure to work with.

Sincerely,

Erwin Chemerinsky

Erwin Chemerinsky - echemerinsky@berkeley.edu

ALEX MACLENNAN

5706 Chestnut Ridge Dr, Cincinnati, OH, 45230 • alex.maclennan@berkeley.edu • 513-535-9166

Writing Sample

The enclosed writing sample comes from my fall 2022 Law and History Foundation Seminar. The class paper offered wide flexibility providing me a chance to do what I had long wanted to do in law school – conduct in-depth research on the history, application, and policy of the Third Amendment to the Constitution.

Yes, this is the Amendment about the quartering of soldiers but there is far more to it than being a constitutional footnote. The Amendment enlightens the understanding of the founding era and has been referenced in case law to support important constitutional values.

The original paper spanned nearly sixty pages but has been edited to its current size for a more manageable writing sample. Of course, I would be happy to provide any or all the omitted parts upon request.

NO QUARTER FOR TYRANNY! A THIRD AMENDMENT FOR THE TWENTY-FIRST CENTURY

*Alex MacLennan**

INTRODUCTION

When I first told my friend that I was writing a paper on the Third Amendment she had to clarify what the Amendment actually was.¹ She was a bright second-year student at one of the top law schools in the world, but those qualifications alone are not enough to rescue the Amendment from obscurity. Indeed, Harvard legal historian Morton Horwitz has noted that many of his colleagues “sheepishly asked [him] what the Third Amendment is” when he told them he would be speaking on the topic.² If the Bill of Rights were in a grade school gym class, it seems likely the Third Amendment would be the last kid picked.

This article argues that contrary to its residence in legal obscurity, the Third Amendment should be reinvigorated for the twenty-first century. Rather than dismissing the Amendment as an outdated relic of 1791, this article argues that it is particularly relevant in light of the Court’s increasing turn toward originalist doctrine, its willingness to overrule long-standing precedent, and the potential shift in constitutional litigation to state courts.

Part I of this article explores the Amendment’s historical origins, the concerns at the time of the framing, and the subsequent, albeit limited, case law. Not only is the history of the Amendment informative for constitutional interpretation, the Amendment has been cited in famous Court opinions and was the turning issue in a Second Circuit case.

Part II poses the question why we should care about the Third Amendment now, given it has never decided a Supreme Court case in its 231-year history. Put simply, the current Court is a Court unlike any other. Its jurisprudence is characterized by a rising tide of originalist philosophy, a correlated search for evidence in constitutional meaning at the time of the

* Alex MacLennan is a second-year J.D. candidate at the University of California, Berkeley, School of Law.

¹ “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” U.S. CONST. amend. III.

² Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209 (1991).

framing, and a willingness to depart from *stare decisis*. Furthermore, the Court's recent decisions are poised to open a new frontier in state constitutional litigation. And the Third Amendment has cousins in nearly all state constitutions, meaning state courts may consider interpretation of the Amendment to be persuasive in interpreting their own state constitutions. Finally, the Amendment could become the tool of a future Court. Today's justices may serve for decades but they will not serve forever. If a new Court shifts ideologically, the new justices might apply the principles of the Amendment broadly – either to give it proper effect in itself or to avoid directly overruling interpretations of other constitutional provisions.

Part III explores what a broad interpretation of the Third Amendment for the twenty-first century could look like. It does this by examining the unresolved issues of the Amendment, of which there are many, and concludes that the Amendment has relevance well beyond its current framing in case law. While recognizing that case law is rare, this part also evaluates proposals from other writers and introduces new ideas.

Part IV completes the analysis by addressing counterarguments to the claim that the Amendment should be reinvigorated for the twenty-first century. It acknowledges that raising a Third Amendment claim is likely a long-shot to win a case – at least for now. But it disputes claims of the Amendment's obsolescence and rejects a narrow textualist reading for a broad reading serving to illuminate our constitutional understanding.

Is the Third Amendment the most important part of the Constitution? No, it is not. But things need not be the most important to be important. For now, Third Amendment litigation makes the news for its oddity alone³ and I am not holding my breath waiting for law schools to add "Third Amendment" to their course catalog. Nonetheless, the Amendment is a tool worth using for its value in interpreting the Constitution and for the broad principles it embodies.

I. THIRD AMENDMENT HISTORY: FROM A CHECK ON THE CROWN TO LIMITS ON MODERN POWER

[Sections A, B, and C cover the historical origins of the Third Amendment]

³ Joe Patrice, *3 Notable Legal Stories from the Short Week*, ABOVE THE LAW (July 5, 2013, 5:39 PM), <https://abovethelaw.com/2013/07/3-notable-legal-stories-from-the-short-week/2/> ("It's a bird, it's a plane, it's a Third Amendment case?").

D. Interpreting the Third Amendment: Case Law and Commentary from 1791 – 2022

Finding sufficient case law to fill a First Amendment or a Criminal Procedure⁴ casebook is easy enough – the challenge is in keeping the book to a size that does not require a herculean task for law students carrying it. In contrast, the rarity of Third Amendment cases makes a Third Amendment casebook a different proposition and, perhaps, closer to a case-pamphlet. Of course, cases require controversy so the rarity of Third Amendment cases may indicate consensus on the soundness of the Amendment. Further, the lack of litigation may show the effectiveness of the Amendment in deterring infringements on rights before they occur.⁵

But while the Amendment has never decided a Supreme Court case, it has had minor parts in *Youngstown* and *Griswold*.⁶ Further, lower courts have occasionally interpreted the Amendment in situations ranging from the important task of incorporation to some highly unusual cases.⁷

Yet, two key principles of the Amendment shine through despite the rarity of on-point litigation: The subservience of military power to civilian affairs and the protection of privacy with an emphasis on the home. Together, these are the recurring principles in Third Amendment case law and commentary and form the strongest foundation for future litigation.

1. From obscurity to the Supreme Court

Americans who thought their quartering days were over got a rude awakening when the United States went to war against Britain again in the War of 1812. Sequels are rarely better than the original and Americans once

⁴ Criminal Procedure courses generally cover the Fourth, Fifth, and Sixth amendments. See generally DRESSLER ET AL., UNDERSTANDING CRIMINAL PROCEDURE VOLUME 1: INVESTIGATIONS (8th ed. 2021).

⁵ Mikulski v. Centerior Energy Corp., 501 F.3d 555, 576 (6th Cir. 2007) (Daughtrey, J., dissenting) (“Especially in this time of seemingly unfettered governmental efforts to intrude into private realms, I would hope that the majority would not equate the “nearly nonexistent” litigation involving the Third Amendment with a lack of importance of the principles protected by that provision.”) See JAY WEXLER, THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS 192-93 (2011) (discussing quote in Third Amendment analysis).

⁶ Griswold, 381 U.S. 479, Youngstown, 343 U.S. at 644 (Jackson, J. concurring).

⁷ Engblom v. Carey, 677 F.2d 957 (2d. Cir. 1982) (incorporation to the states), Jones v. United State Dept. of Defense, 346 F. Supp. 97 (D. Minn. 1972) (Third Amendment challenge regarding soldiers marching in parade).

again endured forced quartering as shown by private compensation acts.⁸ Prof. Bell also notes that, while the Mexican-American War raised the possibility of quartering, his analysis found no potential Third Amendment violations⁹

a. Antebellum analysis

The lack of nineteenth-century case law should not be interpreted as meaning courts and writers ignored the evils of quartering. In one example, a Louisiana court noted “[t]he quartering of troops in their dwellings without their consent” as an evil endured by the inhabitants of a foreign country in a case at issue.¹⁰ Still, cases dealing with such issues were rarely before courts.¹¹

While the nineteenth-century courts rarely examined the Third Amendment, it did receive occasional mention from legal writers. The most notable is in Chief Justice Joseph Story’s *Commentaries* where he said the “provision speaks for itself” and that it secures “... the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion.”¹² Other writers of the time wrote on how it protected “the comfort of the citizens”¹³ and how it protected the house against military intrusion as the common law protected against civil intrusion.¹⁴

Writers also cited the Amendment for limiting abuses of the sword and actions by the commander-in-chief, even in wartime.¹⁵ Francis Lieber used the Amendment as part of a larger criticism of military power in standing armies and advocated as small a standing army as possible.¹⁶ And Lieber supported ultimate control by the civil power – a group Lieber claims military

⁸ Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WILLIAM AND MARY BILL OF RTS. J. 117, 137 (1993).

⁹ *Id.* Professor Bell partially credits this lack of Third Amendment violations to the conflict taking place in sparsely populated areas and on foreign soil.

¹⁰ *In re Charge to Grand Jury*, 30 F.Cas 1023 (La. Cir. Ct. 1859).

¹¹ But see *Brigham v. Edmunds*, 7 Gray 359 (Mass. 1856) (rejecting quartering claim under Massachusetts state constitution as soldiers were not in house but instead in field).

¹² 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 608 (Lawbook Exchange Ltd. 2d ed. 2005) (1851).

¹³ BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN WITH A COMMENTARY ON STATE AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES 179 (1832).

¹⁴ TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 165 (3d ed. 1855).

¹⁵ *Id.* and OLIVER, *supra* note 13.

¹⁶ FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 116-123 (1859).

officers dubbed “babbling lawyers.”¹⁷

b. The Civil War, Reconstruction, and the Third Amendment

Of course, the largest American conflict of the nineteenth-century was the Civil War where quartering did take place¹⁸ despite the Third Amendment and a copycat provision in the Confederate Constitution.¹⁹ Although the amounts were never paid, the Committee on War-Claims estimated that compensation for rent and damages from Civil War quartering would have amounted to “very many millions.”²⁰

Professor Bell makes a convincing argument that this quartering violated the Third Amendment whether a state of war existed or not.²¹ He notes that if there were no state of war, the quartering violated the first clause of the Amendment barring quartering in peacetime.²² And even if a state of war did exist, Congress had not provided for quartering by law, thereby violating the Amendment’s second clause.²³ Bell sees “reading the Third Amendment to leave a gap between peace and war wide enough for the Executive to order the quartering of troops during times of unrest” as the only viable way to see the Amendment as not violated.²⁴ He also mentions the ignorance-of-the-law possibility but makes a compelling argument that this would amount to “disregarding an entire portion of the Bill of Rights.”²⁵

The Third Amendment was briefly mentioned by the Supreme Court in the aftermath of the Civil War, but not in cases about remedies for quartering. Instead, the Amendment was cited in *Ex Parte Milligan* for the proposition that “...no limitations were put upon the war-making and war-conducting powers of Congress and the President...” except for the Amendment itself.²⁶

So, was the Third Amendment already doomed to be ignored in law and the political process? Hardly, answered Congress during Reconstruction. These years sought such an expansion of rights and restructuring of the

¹⁷ *Id.* at 120.

¹⁸ Bell, *supra* note 8 at 138.

¹⁹ CONSTITUTION OF THE CONFEDERATE STATES March 11, 1861, art. 1, § 9, para. 14.

²⁰ Bell, *supra* note 8 at 138-39.

²¹ *Id.* at 139.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 140.

²⁵ *Id.*

²⁶ *Ex parte Milligan*, 71 U.S. 2, 20-22 (1866). *Contra* *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring).

country that some historians have come to refer to it as the “Second Founding.”²⁷ And the Third Amendment was no exception.

As part of the discussion, constitutional law professor Chester James Antieau noted the discussion of the Third Amendment during the debates on how the Fourteenth Amendment would apply to the states:

The distinguished Senator Jacob M. Howard of Michigan, who brought forward the proposed Amendment to the Senate floor, stated there on May 23, 1866, that the provisions and principles contained in the first eight Amendments to the Constitution would by the Fourteenth Amendment become binding upon the States. He then specifically included "the right to be exempt from the quartering of soldiers in a house without the consent of the owner." Comparable proof was provided in the House of Representatives by Representative John Bingham of Ohio, draftsman of the first section of the Fourteenth Amendment. When Bingham spoke in Congress in 1871, he recalled that among the fundamental rights intended to be safeguarded for all Americans against State abridgment, by the Fourteenth Amendment was a right to the "inviolability of their homes in time of peace, in that no soldier should be quartered in any house without the consent of the owner."²⁸

Antieau noted that even opponents of the Fourteenth Amendment specifically mentioned that it would directly apply the Third Amendment’s quartering restrictions to the states.²⁹

c. The long slumber

Yet, even as other parts of the Bill of Rights began to decide cases in the late nineteenth and early twentieth centuries,³⁰ the Third Amendment remained a rare presence in the courts. This is not to say commentary on the Amendment dried up - it still played an ancillary role in constitutional law

²⁷ See generally ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2020).

²⁸ CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 118 (1997).

²⁹ *Id.* at 119.

³⁰ See *Herndon v. Lowrey*, 301 U.S. 242 (1937) (reversing conviction of communist party organizer on First Amendment grounds, *Gitlow v. New York* 268 U.S. 652 (1927) (applying First Amendment to the states), *Bram v. United States*, 168 U.S. 532 (1897) (Fifth Amendment privilege in federal criminal trials), *Boyd v. United States*, 116 U.S. 616 (1886) (Fourth Amendment violation by federal government).

books.³¹ Perhaps the highest profile writing on the Third Amendment in the era came from Judge Thomas M. Cooley's *Constitutional Limitations*. There, he wrote that "[i]t is difficult to imagine a more terrible engine of oppression than the power of the executive to fill the house of an obnoxious person with a company of soldiers..."³² and that the Amendment is "...but a branch of the constitutional principle, that the military shall in time of peace be in strict subordination to the civil power."³³

The Third Amendment even appeared in discussion of law beyond American borders. Law professor Raleigh C. Minor mentioned restrictions on quartering of soldiers as one of the rights under his proposed federal league of nations.³⁴ His rationale focused heavily on the imposition of unequal burdens but also made mention that quartering had the effect of "very seriously impairing and interfering with the privacy and freedom of the home."³⁵

World War II created one more path for Third Amendment litigation, but it was one not taken. In 1942, the United States government, fearing Japanese invasion, forced Alaska natives from their homes in the Aleutian Islands.³⁶ During the forced removal, the US government not only quartered soldiers in the natives' homes but also destroyed personal property of the natives and even razed entire villages.³⁷ But, no Third Amendment litigation came of the government actions and its likelihood of success would have been questionable given this was not exactly a time of racial enlightenment.³⁸ The

³¹ See HENRY FLANDERS, EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 239 (3rd ed. 1881), PLATT POTTER, GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 526 (1871), JOEL TIFFANY, A TREATISE ON GOVERNMENT AND CONSTITUTIONAL LAW 394-95 (1867).

³² THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 435 (7th ed. 1903).

³³ *Id.* at 435-36.

³⁴ RALEIGH C. MINOR, A REPUBLIC OF NATIONS: A STUDY OF THE ORGANIZATION OF A FEDERAL LEAGUE OF NATIONS 173 (Lawbook Exchange Ltd. 2005) (1918).

³⁵ *Id.*

³⁶ Tom W. Bell, *Property in the Constitution: The View From the Third Amendment*, 20 WILLIAM & MARY BILL OF RTS. J. 1243 (2012).

³⁷ *Id.* at 1243-44.

³⁸ See generally *Korematsu v. United States*, 323 U.S. 214 (1944) (effectively upholding Japanese internment during World War II). The case has been highly criticized and was repudiated by Chief Justice John Roberts' majority opinion in *Trump v. Hawaii*, 138 S. Ct 2392, 2423 ("Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.") (citing *Korematsu*, 323 U.S. at 248) (Jackson, J., dissenting)).

Third Amendment would have to continue waiting to be directly applied by federal courts.

d. To the federal courts

The privacy principle of the Third Amendment earned it a tangential mention in 1937. In *Wallace v. Ford*, plaintiffs asked the court to grant an injunction to restrict officers acting under a state liquor law.³⁹ The court engaged in a discussion of the Third Amendment.⁴⁰ After briefly discussing the Amendment's history, the court noted that "[t]here is something in the soul of the free man that resents any sort of espionage."⁴¹ Although the plaintiffs lost their injunction on other grounds, the court provided one of the earliest opinions using the Third Amendment in support of privacy.

The Amendment would get some redemption at the Supreme Court in 1952, but its 1951 appearance in federal court was more embarrassing than anything else. The defendant in *United States v. Valenzuela* sought to challenge a rent control act and argued that it created "the incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers upon the people in violation of Amendment III of the United States Constitution."⁴² It is not recorded whether the judge found it amusing but it is recorded that he found it without merit.⁴³ Nonetheless, the case lives on as the founding father of the absurd branch of Third Amendment progeny.⁴⁴

Valenzuela gave the Third Amendment a silly role, but *Youngstown* gave it a serious one. Commonly known as the *Steel Seizure Case*, the Court ruled against President Harry Truman's seizures of steel mills during the Korean War in a highly fractured decision.⁴⁵ Justice Jackson's concurring opinion saw the Constitution as establishing limits on the domestic power of the Commander-in-Chief, even in wartime.⁴⁶ Among the limits that Jackson cited in his reasoning was the Third Amendment which has the effect that "even in

³⁹ *Wallace v. Ford*, 21 F. Supp. 624 (N.D. Tex. 1937).

⁴⁰ *Id.* at 627.

⁴¹ *Id.*

⁴² *United States v. Valenzuela*, 95 F. Supp 363, 366 (S.D. Cal. 1951).

⁴³ *Id.*

⁴⁴ See below "The strange, funny, and frivolous."

⁴⁵ *Youngstown*, 343 U.S. 579.

⁴⁶ *Id.* at 634-56. See generally MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* 207 (2d ed. 1994) (noting that "Jackson disavowed any intent to circumscribe or contract the constitutional role of the President as Commander in Chief" and Jackson was primarily concerned about executive power turning inward for a lawful economic struggle).

war time, [the Commander-in-Chief's] seizure of needed military housing must be authorized by Congress."⁴⁷ While not quite the same as the penumbras theory articulated by Justice Douglas in the coming years, it was a significant move toward recognizing the Third Amendment as conveying a broader principle rather than a narrow limitation – a growing theme in the coming years.⁴⁸

The privacy principle of the Third Amendment began to emerge from its chrysalis in Douglas' dissent in *Poe v. Ullman*.⁴⁹ The case involved Connecticut's anti-contraception law – an issue Douglas would eagerly return to just a few years later.⁵⁰ For now though, Douglas dissented as the majority under Justice Felix Frankfurter refused the request for a declaratory judgment against the law on standing grounds.⁵¹ In his forty-five page dissent, Douglas made clear his willingness to find the law unconstitutional on privacy grounds.⁵² And among the evidence supporting his view of privacy as part of liberty was the Third Amendment.⁵³

But Douglas got his revenge on the Connecticut anti-contraception law four years later in *Griswold v. Connecticut*.⁵⁴ In between the cases, Justice Frankfurter had retired and been replaced by liberal Justice Abe Fortas ushering in the high tide of the Warren Court.⁵⁵ Douglas' lengthy dissent in *Poe* made him the natural choice to write the *Griswold* opinion but Douglas' "checkered marital history and extramarital dalliances" may have also played a role.⁵⁶

The *Griswold* opinion read in constitutional law classes across the United States today is quite unlike the "five-page, double-spaced opinion that offered the narrowest possible grounds on which to strike down the law."⁵⁷ The

⁴⁷ *Id.* at 644.

⁴⁸ Cf. *Ex parte Milligan*, 71 U.S. 2, 20-22. Milligan saw the Third Amendment as an exclusive limitation on executive power whereas Jackson's Youngstown concurrence reversed this viewing the Amendment as part of a broader principle.

⁴⁹ 367 U.S. 497 (1961).

⁵⁰ *Griswold*, 381 U.S. 479.

⁵¹ *Poe*, 397 U.S. 497.

⁵² *Id.* at 509-55.

⁵³ *Id.* at 549.

⁵⁴ *Griswold*, 381 U.S. 479.

⁵⁵ BRUCE ALLEN MURPHY, *WILD BILL: THE LIFE AND LEGEND OF WILLIAM O. DOUGLAS* 360-61 (2003). This is not to say Douglas was happy to see Frankfurter's health force him to leave. Douglas penned a note wishing him well and adding that "[t]he conferences are *not* shorter by reason of your absence!!" *Id.*

⁵⁶ *Id.* at 384.

⁵⁷ *Id.*

original draft sought to bring the spousal relationship within the right of association in the First Amendment and only after the prodding of Justice William Brennan and Brennan's law clerk did Douglas' opinion expand to include the penumbras known today.⁵⁸

By developing the penumbras, Douglas gave the Third Amendment its greatest enunciation of the privacy principle. In *Griswold*, Douglas wrote of the Third Amendment as one of the "[v]arious guarantees [that] create zones of privacy."⁵⁹ There, he saw the Third Amendment as "another facet of that privacy."⁶⁰ However, Douglas only mentioned the Third Amendment once and even then, only as one supporting factor in his penumbral analysis.⁶¹ Nonetheless, *Griswold* has gone on to be the preeminent case cited to today for the Third Amendment's privacy principle.

The Third Amendment received a couple more shout-outs by the Court in the next several years. It was cited in a footnote in the landmark *Katz v. United States* decision for the rule that it protects an aspect of privacy by preventing the peacetime quartering of soldiers.⁶² Yet, it received a greater part in *Laird v. Tatum* where the Amendment's prohibitions were cited for "their philosophical underpinnings [which] explain our traditional insistence on limitations on military operations in peacetime."⁶³ The Court went on to note that:

"when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied."⁶⁴

These instances notwithstanding, the Supreme Court would rarely mention the Third Amendment and wholly refrained from deciding a case on a Third Amendment basis. It was the Second Circuit Court of Appeals that would

⁵⁸ *Id.* at 384-87. Brennan later said of Douglas that his "last ten years on the Court were marked by the slovenliness of his writing and the mistakes that he constantly made." *Id.* at 386.

⁵⁹ *Griswold*, 381 U.S. at 484.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Katz v. United States*, 389 U.S. 347 n.5 (1967).

⁶³ 408 U.S. 1, 15 (1972).

⁶⁴ *Id.* at 15-16.

decide the most important case in Third Amendment history.

2. The Second Circuit makes history

If a law professor wanted to throw students a curveball, a Third Amendment hypo would be a good start. But where would such a hypo ever be found in real life? The Second Circuit has the answer.

The case is *Engblom v. Carey*⁶⁵ and it is the highest authority on the Third Amendment to-date. The court noted it was the first time that a federal court would give an opinion on the literal interpretation of the Third Amendment.⁶⁶ This earns the case a mention in any complete modern Third Amendment analysis, and its own Wikipedia article as well⁶⁷ – potentially influential given the reliance by certain judges on Wikipedia.⁶⁸ If constitutional law has *Marbury*,⁶⁹ Third Amendment law has *Engblom*.

The case arose from events surrounding a strike by New York prison officers. The striking officers resided on the grounds of the prison facility, had money deducted from their salaries for monthly rent, and were directed to maintain their rooms “in accordance with normal ‘landlord-tenant’ responsibilities and practices.”⁷⁰

After a statewide strike of prison officers began, Governor Hugh Carey activated the National Guard and housed them in the prison officials’ rooms.⁷¹ When the strike ended after a few weeks, plaintiffs were denied a return to their rooms. They sued under the Third Amendment and Fourteenth Amendment due process.⁷²

Engblom quickly dealt with the issue of incorporation to the states, holding that the Third Amendment is incorporated.⁷³ The court cited

⁶⁵ 677 F.2d 957.

⁶⁶ *Engblom*, 677 F.2d 959; *id.* at n.1.

⁶⁷ ENGBLOM V. CAREY, https://en.wikipedia.org/wiki/Engblom_v._Carey (last visited Nov. 4, 2022).

⁶⁸ Will Knight, *Wikipedia Articles Sway Some Legal Judgments*, WIRED (Aug. 2, 2022, 4:29 PM), <https://www.wired.com/story/wikipedia-articles-sway-some-legal-judgments/>.

⁶⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁷⁰ *Id.* at 960.

⁷¹ *Id.*

⁷² The district court dismissed both claims on summary judgment. *Id.* *Engblom* reversed on the Third Amendment claim but affirmed on the due process claim. *Id.* at 959.

⁷³ *Id.* at 961. The district court had also held the Third Amendment was incorporated. *Id.*

Griswold and held the Third Amendment is a fundamental right “implicit in the concept of ordered liberty.”⁷⁴

Next, the Second Circuit disagreed with the district court about the scope of property rights recognized in the Third Amendment. The court acknowledged that “[u]nder a technical and literal reading of the language, the Third Amendment would only protect fee simple owners of houses,” but rejected this view in favor of a broader reading similar to analogous contexts.⁷⁵

The court then held that “[t]he Third Amendment was designed to assure a fundamental right to privacy,” once again citing *Griswold*.⁷⁶ The court looked to analogous contexts in the Fourth Amendment and noted how the Supreme Court had rejected common law property ownership as a requirement for a legitimate expectation of privacy under the Fourth Amendment.⁷⁷ The court went on to point out that it would be anomalous to grant individuals protection against unreasonable searches and seizures while allowing soldiers to be quartered in their houses.⁷⁸ Finally, the court held that fee simple ownership was not a requirement for Third Amendment protection and that protected interests “extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others.”⁷⁹

The court reversed the district court’s summary judgment on the grounds that the facts did “...not preclude a finding that [the plaintiffs] had a substantial tenancy interest in their staff housing, and that they enjoyed significant privacy due to their right to exclude others from what were functionally their homes.”⁸⁰

Unfortunately for the plaintiffs, this was not enough to prevail on their Third Amendment claim. On remand, the district court held that qualified immunity applied since the plaintiffs’ Third Amendment rights were not clearly established at the time.⁸¹ And the Second Circuit affirmed on appeal ending the leading Third Amendment case.⁸²

⁷⁴ *Id.* (quoting *Griswold*, 381 U.S. at 499).

⁷⁵ *Id.* at 962.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 964.

⁸¹ *Engblom v. Carey*, 572 F. Supp. 44 (S.D.N.Y. 1983).

⁸² *Engblom v. Carey*, 724 F.2d 28 (2d. Cir.1983).

Despite the plaintiffs' loss on qualified immunity grounds, *Engblom*⁸³ made Third Amendment history. It is the case to cite for the proposition that the Third Amendment is incorporated to the states and that the term "soldiers" under the Amendment applies to more than just the United States military.⁸⁴ Additionally, *Engblom* directly set forth the privacy principle of the Third Amendment and gave it a scope similar to the Fourth Amendment, which is cited for that as well.⁸⁵

3. A modern mixed bag of case law

The Third Amendment has not seen any cases as authoritative and on-point since *Engblom*.⁸⁶ However, once awoken from its slumber the Amendment has refused to go back to bed. It has featured in cases that have tested its limits and has seen its principles of privacy and limits on military power cited in even more cases. It has also made guest appearances in numerous frivolous suits, which are as amusing as they are ridiculous.

a. Testing the Third Amendment's limits

On-point Third Amendment cases are the solar eclipses of case law – they rarely occur, attract attention when they do, and should be viewed through a proper lens. In *Estate of Bennett v. Wainwright*, a federal district court addressed the plaintiffs' claim of "illegal quartering" but dismissed it on the grounds that "[t]here is no sense in which a single state trooper and several deputy sheriffs can be considered "soldiers" within the meaning of that word as it is used in the amendment..."⁸⁷ Thus, the court did not see the Amendment as applicable to ordinary police but did not indicate what forms of policing may rise to inclusion within the Amendment.

Mitchell v. City of Henderson,⁸⁸ picked up the Third Amendment baton

⁸³ *Engblom*, 677 F.2d 959.

⁸⁴ *McDonald v. City of Chicago*, 561 U.S. 742 n.13 (2010) (citing *Engblom* in discussing whether Third Amendment is incorporated but not deciding the issue), *Nika Corp. v. Kansas City*, 582 F. Supp. 343 n.2 (W.D. Mo. 1983) (citing *Engblom* in writing "In addition, although the Supreme Court has never addressed the issue, it would seem reasonably clear that the rights guaranteed under the Third Amendment would also be included in this category [of incorporation]"), *Mitchell*, 2015 WL 427835 at *17 (citing *Engblom* for Third Amendment incorporation, scope of "soldier," and privacy principle).

⁸⁵ *Mitchell*, 2015 WL 427835 at *17 (citing *Engblom* for privacy principle).

⁸⁶ *Engblom*, 677 F.2d 959.

⁸⁷ 2007 WL 1576744 at *7.

⁸⁸ 2015 WL 427835.

in 2015 and is the closest Third Amendment examination since *Engblom*. In *Mitchell*, the plaintiffs alleged, among other claims, that police violated the Third Amendment when they forcibly entered his house, “...swarmed through ... [his] home ..., searching through his rooms and possessions and moving his furniture, without permission or a warrant, and then subsequently occupied it and used it as an observation post to surveil [another person's] house.”⁸⁹ The plaintiffs alleged “that the approximately nine hours of police occupancy in this case amounts to quartering.”⁹⁰

The *Mitchell* court rejected the plaintiffs’ Third Amendment claim while engaging in some significant Third Amendment analysis. It cited *Estate of Bennett* while stating that “a municipal police officer is not a soldier for purposes of the Third Amendment.”⁹¹ The court supported its reasoning by stating that it was “...not a military intrusion into a private home, and thus the intrusion is more effectively protected by the Fourth Amendment.”⁹² Furthermore, while the court explicitly did not decide the issue of whether a nine-hour occupation would amount to quartering, it noted in dicta that it would suspect not.⁹³

But there was more to the court’s Third Amendment analysis. First, the court accepted the Third Amendment’s property-based privacy principle citing *Griswold* and *Engblom*.⁹⁴ Second, the court noted that the Amendment provides restrictions on “...incursion by the military into their property interests, and guarantees the military’s subordinate role to civil authority.”⁹⁵ And third, it appeared to accept the incorporation of the Amendment in its favorable citation of *Engblom*.⁹⁶ In sum, despite ultimately rejecting the Third Amendment claim, the *Mitchell* court affirmed both the Amendment’s privacy principle and its principle for civilian control over the military.

Going beyond *Mitchell*, the Third Amendment has been raised in a few more tangential ways. In *Custer County Action Ass’n. v. Garvey*,⁹⁷ the Tenth Circuit addressed a claim by plaintiffs that military flights over their land violated the Third Amendment. While the court cited *Engblom* favorably, it found it “borders on frivolous” to argue that flights in regulated, lawful

⁸⁹ *Id.* at *3.

⁹⁰ *Id.* at *17.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at *17-18.

⁹⁷ 256 F.3d 1024 (10th Cir. 2001).

airspace violate the Third Amendment.⁹⁸ Additionally, the court cited Fourth and Fifth Amendment principles showing a possible willingness to use them in interpreting the Third Amendment.⁹⁹

In *Johnson v. United States*, a federal district court faced a Third Amendment claim and issued a decision swimming in aquatic puns.¹⁰⁰ The plaintiffs presented an interesting Third Amendment argument based on allegations that the United States military unlawfully quartered chemicals on the plaintiffs' property.¹⁰¹ The court was, therefore, given a unique opportunity to decide on whether to take a broad reading of "soldier" to include other military activities as well as examining the property rights aspect and relation to the Fifth Amendment. But even though plaintiffs invited the court to "eat the first shrimp," the court ruled against plaintiffs on procedural grounds.¹⁰² The Third Amendment claim was left unanalyzed creating a free hypo for law professors but leaving Third Amendment researchers lost at sea.

b. Affirming Third Amendment policies

Cases referencing the Third Amendment for its underlying principles are – not surprisingly – far more common than cases literally applying the Amendment. But the most common principles – privacy and limiting military power – are powerful and have been cited in numerous cases.

The D.C. Circuit spoke of the Third Amendment in broad terms regarding military activities in *Ramirez de Arellano v. Weinberger*.¹⁰³ Although the case involved allegations of actual soldiers on plaintiffs' property, the court broadly discussed the Third Amendment in a footnote saying "[t]he spirit of the Nation's historic commitment to protecting private citizens' rights against

⁹⁸ *Id.* at 1043.

⁹⁹ *Id.* at 1043-44.

¹⁰⁰ 238 F.R.D. 199, 200 (W.D. Tex. 2006) ("Though plaintiffs' counsel makes a whale of an argument, the appellate sharks may find it fishy if an Article III federal trial court were to crawfish on its obligation to follow Congressional intent and the Article III judicial chain of command, absent a proper precedential hook. Plaintiffs want this Court to abandon its Article III ship and take up the oar of the Article I Court of Federal Claims Rules. Were the Court to take plaintiffs' bait, it would probably be reversible bottom feeding. Moreover, shrimp are said to be high in cholesterol and this Court prefers red herring, actual not metaphorical. For reasons anchored in legal, non-aquatic concepts, plaintiffs' motion for opt-in class certification is sunk.")

¹⁰¹ *Id.* see also *Johnson v. United States*, 208 F.R.D. 148 (W.D. Tex. 2001) (previous case history of *Johnson*, 238 F.R.D. 199).

¹⁰² *Id.*

¹⁰³ 745 F.2d 1500 n.186 (D.C. Cir. 1984).

military excesses is embodied in the third amendment's express prohibition against the quartering of soldiers in private homes."¹⁰⁴ Whether the court viewed the Third Amendment itself as prohibiting such "military excesses" is unclear, but by providing evidence of a "historic commitment," it found the Third Amendment might make itself valuable to a court looking for rights "deeply rooted in this Nation's history and tradition."¹⁰⁵

The Second Circuit got another chance to develop its Third Amendment jurisprudence in *Padilla v. Rumsfeld*.¹⁰⁶ The court cited the Amendment as demonstrating the framers' belief about the sanctity of the home and the need to prevent military intrusion.¹⁰⁷ Further, the court held that the Third Amendment's grant of power to Congress rather than the President demonstrated that, absent congressional authorization, the President did not have the power to detain the plaintiff.¹⁰⁸

In *El-Shifa Pharmaceutical Industries Co. v. United States*, the Federal Circuit addressed a case of enemy property designation by the president and briefly cited the Third Amendment.¹⁰⁹ While it was not applicable to the foreign property at issue, the court cited Jackson's *Youngstown* concurrence and reasoned the Third Amendment might support limitations on enemy designation of domestic property as part of limitations on domestic use of military power.¹¹⁰

In *United States v. Dreyer*, the Ninth Circuit referenced the Third Amendment as a constitutional underpinning of the Posse Comitatus Act.¹¹¹ The court further explained in a footnote citing *Laird v. Tatum* and its resistance to military intrusion into civilian affairs.¹¹² But the court appeared unfriendly to the idea of creating an exclusionary rule connected to the Third Amendment since it refused to apply the rule to violations of the Third Amendment underpinned Posse Comitatus Act.¹¹³

Even state courts have occasionally cited anti-quartering provisions

¹⁰⁴ *Id.*

¹⁰⁵ Dobbs, 124 S. Ct. at 2242.

¹⁰⁶ 352 F.3d 695 (2d. Cir. 2003), rev'd on other grounds in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

¹⁰⁷ *Id.* at 714-15.

¹⁰⁸ *Id.* at 715.

¹⁰⁹ 378 F.3d 1146, 1169-70 (Fed. Cir. 2004).

¹¹⁰ *Id.* (citing *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring)).

¹¹¹ 804 F.3d 1266 (9th Cir. 2015).

¹¹² *Id.* at 1272 and n.7.

¹¹³ *Id.* at 1278-80.

mirroring the Third Amendment in their state constitutions in support of a right to privacy. Although declining to reach the right to privacy in *Zaatar v. City of Austin*, the Texas Court of Appeals cited Article 25 of the Texas Constitution, a prohibition on quartering, as supportive of the right.¹¹⁴

c. The strange, funny, and frivolous

The strangeness of the Third Amendment in the modern world has also made it a tool that the unskilled love to wield in frivolous ways. There are plenty of examples of cases where no facts are alleged that even remotely touch on the Amendment, in which it seems the plaintiffs are throwing a bowl of constitutional spaghetti against the wall to see what sticks. Occasionally, judges have appeared annoyed by these uses of the Amendment such as the judge in *Watts v. Regions Financial Corp.* who lamented the “[t]he Sisyphean task of clearing the court’s high-Wattage docket...”.¹¹⁵ There is no need to discuss these cases that fail to advance Third Amendment jurisprudence other than for entertainment value and to give a full picture of Third Amendment litigation.¹¹⁶

B. *Third Amendment History and Case Law Summary*

Third Amendment litigation is the Amur leopard of the legal world: Rare to find, beautiful to see, and most appreciated by those with knowledge of the subject. Courts and commentators have shown that the Amendment still has relevance today and they are wise to do so. The Third Amendment may typically be analyzed as a historical artifact, but artifacts can tell us a lot about who we are and what our country stands for. In the case of the Third Amendment, the historical record is clear in showing an affirmation of the principles of limiting military power and protecting privacy.

The case law and commentary since 1791 has repeatedly reaffirmed these principles showing the Amendment remains relevant today. In the words of Chief Justice Warren Burger:

¹¹⁴ 615 S.W. 3d. 172 n.9 (Tex. Ct. App. 2019).

¹¹⁵ 2016 WL 4436318 at *1 (N.D. Ala. Aug. 23, 2016).

¹¹⁶ Occasionally the Third Amendment has been mistaken for other amendments. See *Marquette Cement Min. Co. v. Oglesby Coal Co.*, 253 Fed. 107 (N.D. Ill. 1918) (“Defendant’s position is that the suit for injunction cannot be maintained because the remedy at law is adequate, and it is therefore entitled to a trial of the facts by a jury, under the third amendment to the federal Constitution”), Jerry Buchmeyer, *Pleading the Third*, 65 TEX. B.J. 93, 94 (2002) (story of individual invoking Third Amendment when the Fifth Amendment would be much more useful), and Bell, *supra* note 8 at 141 (discussing strange uses of Third Amendment).

Though that danger [of British military power] is long past, the Third Amendment still embodies the same principles: that the military must be subject to civilian control, and that the government cannot intrude into private homes without good reason.¹¹⁷

It is important to keep these principles in mind when considering current Third Amendment issues and how to use the Amendment in our modern world.

[Parts II, III, and IV omitted]

CONCLUSION

The Third Amendment's reputation as the Constitution's "runt piglet" should not hold back its use in the twenty-first century – even runt piglets can achieve great things.¹¹⁸ The history of quartering and the debates of the framers show that there is much more to the Third Amendment than keeping soldiers from physically lodging in Americans' homes.

The Court has a unique opportunity to use its originalist views to reinvigorate the Third Amendment as it did the Second. And in the absence of Supreme Court action, state courts should not sit on the sidelines. They too have quartering provisions in their state constitutions that they should bring to bear as state courts increasingly become constitutional battlegrounds.

The Third Amendment has been in existence for 231 years, and it has no expiration date. Its obscurity means there is no real movement for its repeal and constitutional inertia means there is no feasible way to repeal it anyway. Thus, it will remain part of our Constitution waiting for a future court to give voice to the framers' principles and "eat the first shrimp."¹¹⁹

* * *

¹¹⁷ Warren E. Burger, *Introduction* 6, in BURNHAM HOLMES, *THE AMERICAN HERITAGE HISTORY OF THE BILL OF RIGHTS: THE THIRD AMENDMENT* (1991).

¹¹⁸ See generally E.B. WHITE, *CHARLOTTE'S WEB* (1st ed. 1952).

¹¹⁹ Johnson, 238 F.R.D. at 200.

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The Honorable Kimberly Swank
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Dear Judge Swank:

I am writing to apply for the 2024 – 2025 clerkship with your chambers. I am currently a rising 3L at the Emory University School of Law in Atlanta, Georgia. Besides attending law school, I also relocated to Atlanta along with my disabled mother for whom I care. We purchased a home and got accustomed to the culture and values of Georgia. Even with all the differences between my native California and the East Coast, the strong work ethic and respect for others in which I was raised made a strong connection.

I have completed most of the classes in Emory Law School's highly regarded and unique Transactional Law Program. My interest in finance and crypto currencies was piqued by my cryptography class at UC Berkeley. Due to my STEM background, I naturally gravitated to research in AI and researched and wrote a paper for an AI seminar. I completed an intensive trial advocacy program last semester that has two weeks dedicated to day long activities under the guidance of practicing attorneys from various firms. The program took me through all the steps of a trial. This fueled my determination to apply for a clerkship. What makes a clerkship with your chambers especially attractive is the wealth of experience in handling a diversity of cases. The diversity handled in a district court exponentially increased my admiration for my grandfather and deep regret for his passing after 50 years on the bench.